No. 86-406

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

KEYSTONE CONSOLIDATED INDUSTRIES, INC.
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW and its LOCAL 449,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an arbitration award which orders a pension funding schedule in conflict with that authorized by Section 303 of the Employee Retirement Income Security Act of 1974, 29 U.S.C § 1083, should be vacated as violative of federal public policy?

2. Whether under the procedural due process clause in the Fifth Amendment, prior notice and hearing to plan participants is required before a funding waiver under Section 303 can be granted to an employer who is party to a collective bargaining agreement which contains a funding provision?

STATEMENT REQUIRED BY RULE 28.1

Keystone Consolidated Industries, Inc., is a publicly-held corporation and has no parent corporation. However, 44% of the outstanding stock of Keystone is owned by Dixie Products, Inc. MetalCrafters, Keystone Steel and Wire and PlastiCrafters are divisions of Keystone.

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OPINIONS BELOW

On February 3, 1986, a divided panel of the United States Court of Appeals for the Seventh Circuit issued an opinion reversing the decision of the district court enforcing an arbitration award. The Seventh Circuit's decision is reported at 782 F.2d 1400 (7th Cir. 1986), and is reproduced in the Appendix to this Petition. App. 16a-42a.[1] After Respondents filed a Petition for Rehearing with Suggestion for Rehearing En Banc, supported

[1] References to the Appendix attached to this petition will be designated as "App. __."

by an amicus brief from the Tax Division of the Department of Justice, the panel voted to withdraw the opinion issued on February 3, 1986, and to issue an opinion affirming the district court. That decision is reported at 793 F.2d 810 (7th Cir. 1986), and is reproduced in the Appendix. App. 1a-15a. The opinion of the district court is unreported and is reproduced in the Appendix. App. 43a-49a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1986. No Petition for Rehearing or Suggestion for Rehearing En Banc was filed by Petitioner. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The following provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, are pertinent to this case:

Section 303:

> (a) If an employer. . .[is] unable to satisfy the minimum funding standard for a plan year without substantial business hardship and if application of the standard would be adverse to the interests of plan participants in the aggregate, the Secretary of the Treasury may waive the requirements of section 1082(a) of this title for such year with respect to all or any portion of the minimum funding standard other than the portion thereof determined under section 1082(b)(2)(C) of this title. The Secretary of the Treasury shall not waive the minimum funding standard with respect to a plan for more than 5 of any 15 consecutive plan years.
>
> (b) For purposes of this part, the factors taken into account in determining substantial business hardship shall include (but shall not be limited to) whether –
>
> (1) the employer is operating at an economic loss,
>
> (2) there is substantial unemployment or

> underemployment in the trade or business and in the industry concerned,
>
> (3) the sales and profits of the industry concerned are depressed or declining, and
>
> (4) it is reasonable to expect that the plan will be continued only if the waiver is granted.

29 U.S.C. § 1083.

Section 302(b)(2)(C):

(2) For a plan year, the funding standard account shall be charged with the sum of – . . .

> (C) the amount necessary to amortize each waived funding deficiency (within the meaning of section 1083(c) of this title) for each prior plan year in equal annual installments (until fully amortized) over a period of 15 plan years

29 U.S.C. § 1082(b)(2)(c).

STATEMENT OF THE CASE

This case presents the special and important question of the relationship between the federal labor laws governing the collective bargaining rights of employers and employees and the federal laws governing the protection of retirement and pension benefits. Specifically, it presents the question whether an arbitrator can construe a pension funding provision in a collective bargaining agreement in a manner inconsistent with the requirements of and public policies underlying ERISA. The Seventh Circuit's resolution of this question conflicts with the statutory language and congressional intent, and jeopardizes the long-term viability of pension plans affecting the lives of millions of current and retired employees.

A. Background

Petitioner Keystone Consolidated Industries, Inc. ("Keystone") is a diversified manufacturer of specialized carbon steel and wire products, as well as hardware and industrial fasteners. R. 24 Ex. 6 at pp. 16, 89-90. The principal markets for Keystone products are the automotive, housing, appliance and furniture markets. *Id.* at p. 16.

Keystone maintains numerous pension plans, including the Pension Agreement involved in this case. *Id.* That Pension Agreement has been the product of collective bargaining between Keystone and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW and its Local 449 (collectively referred to as "the Union") since 1955. R. 21 at p. 12. Prior to the 1968-71 agreement, the pertinent funding language provided:

> The Company agrees that prior to the termination date of this Agreement it will have made contributions to the trust fund sufficient to cause the aggregate market value or cost of the assets in the fund . . . to equal (a) the normal cost of the. . . benefits . . . which have accrued . . . and (b) the amount required to fund the lump sum past service cost of . . . benefits . . . over a 40-year period . . . .

R. 21, Exs. D-G. Beginning with the 1968-71 Pension Agreement and continuing through the current agreement, Article VI, Section 2 provided:

> The Company agrees to make contributions to the trust fund on an annual basis during the term of this Agreement. . . .

App. 2a.

B. Keystone's Economic Condition And The Basis For The Waiver Of Its 1979-80 Plan Year Contribution

Due to severe economic recession in its principal markets, Keystone experienced unprecedented operating losses since at least July 1, 1979. R. 24, Ex. 6 at pp. 91-92, 100-05. On a consolidated basis, Keystone suffered a net loss of nearly $3.5 million for the fiscal year commencing July 1, 1979. *Id.* at p. 100. This dramatic loss was followed by a net loss of more than $2.5 million in the subsequent fiscal year. *Id.* at p. 101. This trend dangerously accelerated and Keystone suffered a net loss of more than $6.6 million from July through December, 1981, followed by an additional net loss of nearly $9.2 million over the first three months of 1982. *Id.* at pp. 104-05. Losses before taxes were far in excess of these net loss amounts. *Id.* at p. 16.

Based upon the huge losses incurred in the 1979-80 fiscal year and forecasts of continued business hardship, Keystone retained Coopers & Lybrand in the fall of 1980 as pension actuaries and financial cost reduction consultants. *Id.* at pp. 92, 122. Both internal management and Keystone's principal creditor, Continental Illinois National Bank, were deeply concerned about Keystone's financial viability at that time. *Id.* at 93-94. Coopers and Lybrand recommended a number of cash saving measures including the reduction of salaries of non-hourly personnel. *Id.* at p. 108. Additionally, Keystone negotiated substantial changes in its union contract with the Independent Steelworkers' Alliance covering its largest operation located in Bartonville and Peoria, Illinois. *Id.* Then, as

found by the arbitrator:

> Faced with a possibility of having to sell a business, default on its only line of credit with The Continental Illinois National Bank *and possible termination of the pension plans*, it followed the advice of its accountants and processed an application for waiver of the minimum funding standards covering all of its pension plans for the plan year 1979-80 with the Internal Revenue Service.

Petitioner's Appendix to the Seventh Circuit at p. 16 (emphasis supplied).

Keystone submitted its waiver request to the IRS (acting on behalf of the Secretary of the Treasury) in December, 1980. R. 24, Ex. 6 at p. 95. The waiver request was discussed extensively in a conference with the IRS in February, 1981, and granted with respect to most plans, including the Pension Agreement in question here, on March 4, 1981. *Id.* at p. 95. In its written findings, the IRS expressly recognized the economic and financial turmoil experienced by Keystone:

> The information submitted [by Keystone]. . . shows that the Company has suffered a substantial loss for the Company's fiscal year ended June 30, 1980, for a variety of reasons, most of which relate to serious downturns in the industries to which it sells its products, including the automotive industry, housing and agriculture. Further, the Company continues to experience a serious problem maintaining a sufficient amount of working capital to prevent technical default under its prime loan obligations.

Petitioner's Appendix to the Seventh Circuit at p. 41. The IRS also expressly found that Keystone would be able to recover from this temporary downturn:

> The Company has nevertheless managed to continue its modernization program so that it can be positioned to take best advantage of turnarounds in the industries it serves. The Company has also pared costs and has reduced future benefit accruals under one of the largest pension plans it maintains. For

> these reasons, we believe the Company can recover from its present hardship and have therefore granted these waivers.

Id.

Having found the statutory requirements satisfied, the IRS granted Keystone a waiver of its 1979-80 minimum funding requirement which allowed Keystone to make the payment in equal installments over a period of 15 years. As additional safeguards for the interests of plan participants, the IRS imposed several conditions:

1. The waiver would become null and void in the event the Pension Agreement was terminated prior to July 1, 1985;

2. Increases in benefits, changes in the rate of benefits accrual or changes in the rate of vesting while any portion of the waived amount remained outstanding would result in the full outstanding amount becoming immediately due and payable, as provided in 26 U.S.C. § 412(f);

3. The deferred amounts would accrue interest until payment was made; and

4. Waivers could not be granted for more than five of any fifteen consecutive plan years, 29 U.S.C. § 1083(a).[2]

C. Arbitration Proceeding

After the Union was notified by Keystone of the waiver, it filed grievances claiming that Keystone violated Article VI, Section 2 of the Pension Agreement which called for "contributions . . .on an annual basis." The Union refused to recognize the controlling impact of the Section 303 waiver. Unable to resolve the dispute, the parties submitted it to arbitration.

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[2]The waiver was not limited to the Pension Agreement at issue here. App. 24a. The waiver encompassed sixteen (16) other pension plans. The waiver did not, however, extend to three (3) pension plans which Keystone already had taken steps to terminate.

In his decision the arbitrator acknowledged Keystone's grave financial condition at the time it sought and was granted the waiver. He stated that he was "persuaded by clear and convincing evidence that in 1980 [Keystone] was in a business recession losing millions of dollars and experiencing a cash flow crunch" (Petitioner's Appendix to the Seventh Circuit at p. 16). He further found that "many untoward disastrous business events might occur" if a waiver was not obtained, including "possible termination of the pension plans" (*id.*).

Despite rendering findings which mirrored the statutory requirements of Section 303, the arbitrator declined to consider the significance of the waiver.[3] Rather, he simply concluded that because the Pension Agreement required annual contributions and did not provide explicitly for a waiver, Keystone did not have the contractual right to obtain a waiver of the annual contribution requirement under Section 303.

D. District Court Proceeding

The enforceability of the award reached the district court under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, on the issue of whether it violated public policy. Keystone contended that the award should not be enforced because, by imposing funding requirements which

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[3] The Union strenuously urged the arbitrator to ignore the compelling financial evidence and the legal significance of the waiver. The Union argued that it would be improper for the arbitrator to consider anything beyond the four corners of the Pension Agreement. The narrow focus sought by the Union is best reflected by the following passage from its post-hearing brief: "It is the UAW's position that the arbitrator's authority is limited to telling the parties what the contract means. Once the arbitrator has performed this function, it is then for the courts to determine whether the arbitrator's award is enforceable. A court will not enforce an agreement which is contrary to law or public policy. *In short, whether the parties' agreement violatives [sic] law or public policy is an issue for a judge, not an arbitrator*" (R. 17 at p. 1) (emphasis supplied).

conflict with those imposed by ERISA, it contravened the public policies embodied in ERISA. The district court rejected Keystone's argument, and concluded that immediate payment of the 1979-80 contribution – although in irreconcilable conflict with the Section 303 waiver – would not conflict with the public policies embodied in Section 303. App. 43a-46a, 49a. It reasoned as follows:

> This waiver, however, merely permits an employer experiencing financial difficulties to avoid payments to the pension fund and remain in compliance with the ERISA statutes. It sets the *minimum* standards for payments. It does not bar employers from undertaking greater contractual obligations, nor does any language in the statute relieve the employer from obligations which it has voluntarily undertaken by entering into a collective bargaining agreement.

App. 45a (emphasis in original).[4]

E. Court Of Appeals' Decisions

In a 2-1 decision, the Seventh Circuit initially reversed the district court's order. The majority recognized that the Section 303 waiver was a vital element of a comprehensive statutory scheme designed to protect the interests of all pension plan participants and beneficiaries. Specifically, the majority concluded that "[b]y refusing to permit Keystone to rely on the payment schedule outlined in ERISA's waiver provision, the arbitrator jeopardized the continued existence of Keystone's pension plan, to the serious detriment of the plan participants." App. 24a.

After the Union sought a rehearing, and after the Tax Division of the Department of Justice filed an amicus brief in support of the Union's position, the panel voted to withdraw

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[4]The district court also questioned the sufficiency of the IRS' written findings and the absence of Union participation in the IRS proceeding. App. 46a.

its prior opinion and to issue an opinion affirming the district court. App. 1a. The panel now held that "ERISA does not forbid parties to collectively bargain for obligations greater than, and separate from, the ERISA minimum funding obligation." App. 8a. In other words, the Court of Appeals found that the rights provided by Section 303 could be waived in a collective bargaining agreement.[5]

The Court of Appeals also noted two constitutional infirmities with the Section 303 waiver process. First, because the Union never was notified of the Section 303 proceeding and not allowed to participate in it, the Court of Appeals held that the Union's procedural due process rights were violated under *Mathews v. Eldridge*, 424 U.S. 319 (1976). App. 11a-13a. Second, the Court of Appeals held that giving effect to the Section 303 waiver would "improperly place the IRS into the role of impermissibly wielding Article III power in determining the contract rights between private parties" in violation of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). App. 13a-14a.

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[5] The Court of Appeals did not, however, make any finding as to whether or not Keystone and the Union intended to waive Section 303 by adopting the annual funding provision. The implied finding that they did is unsupportable because the "annual funding" contract language was adopted years before ERISA was enacted. App. 25a. Moreover, the record evidence uncontrovertedly establishes that at no point during the 1977 or 1980 negotiations did Keystone and the Union even consider funding waivers or Section 303. App. 25a.

Furthermore, the Seventh Circuit relied upon 29 U.S.C. § 1145 to support its position that parties to a collective bargaining agreement could contract for benefits greater than that provided by ERISA "to the extent not inconsistent with law." In this case, however, construing the labor contract as a waiver of Section 303 rights does produce a result inconsistent with ERISA. Moreover, Section 1145 only applies to "multiemployer" pension plans. There is no multiemployer plan involved in this case.

REASONS FOR GRANTING THE WRIT

This case presents to the Court for the first time the question of whether an arbitrator, in construing a pension funding provision in a collective bargaining agreement, can disregard federal pension laws regarding the timetable for the payment of pension fund contributions. Specifically, this case presents the question of whether an arbitrator can order immediate payment of an annual funding contribution even though a waiver under Section 303 of ERISA, allowing payment to be made in equal installments over a 15 year period, has been granted by the IRS to the employer. This case also presents to the Court for the first time the question of whether the waiver-granting process followed by the IRS under Section 303 is constitutionally defective as being violative of procedural due process.

The Seventh Circuit's resolution of these questions jeopardizes the interests of potentially hundreds of thousands of plan participants and beneficiaries by denying them a statutory right and by dangerously increasing the risk of pension plan termination – the precise danger that Congress intended to alleviate by enacting Section 303. Unless the Seventh Circuit's decision is reversed, Congress' carefully crafted statutory scheme covering the funding of pension plans will be disrupted and the interests of plan participants and beneficiaries will be adversely affected.

I. BECAUSE THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE PUBLIC POLICIES EMBODIED IN ERISA, THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE SCOPE OF SECTION 303

A. By Jeopardizing The Interests Of Plan Participants And Beneficiaries, The Seventh Circuit Contravenes Congressional Intent

The overriding purpose of ERISA is to protect the interests of participants in private pension plans. *See* 29 U.S.C. § 1001 (Congressional findings and declaration of

policy); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 374 (1980). This is accomplished through a scheme of regulation, including requirements regarding funding. In enacting the funding requirements, Congress was keenly aware of the fact that some employers would occasionally be unable to comply with the Act's minimum funding standards. Congress further recognized that rigid enforcement of the minimum annual funding requirement could undermine the interests of plan participants by unnecessarily requiring an employer to terminate a plan, fire employees, cut pay or declare bankruptcy in times of temporary financial distress.[6] Congress concluded that it would be in the interests of plan participants to avoid these drastic consequences by waiving annual funding under certain circumstances, especially where the financial crisis was anticipated to be of limited duration, and to require payment of the amount waived in future years.

In sum, Congress reasoned that a postponement of the contribution was justified in order to ensure the long-term survival of the pension fund.[7] Rigid enforcement of the annual

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[6] The concern most frequently mentioned in Committee Reports was with plan termination. *See, e.g.*, H.R. Rep. No. 779, 93d Cong., 2d Sess. 80 (1974), *reprinted in* 2 Subcommittee on Labor, Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 2669 (1976) [hereinafter cited as *Legislative History*]; H.R. Rep. No. 807, 93d Cong., 2d Sess. 81-82 (1974), *reprinted in* 2 *Legislative History*, at 3201-02; *see also* Senate Debate on Conference Report on H.R. 2, 93d Cong., 2d Sess. (1974), *reprinted in* 3 *Legislative History*, at 4813, 4817. The centrality of this concern was underscored in the text of Section 303, which requires the Secretary, in ruling upon a waiver request, to consider whether "it is reasonable to expect that the plan will be continued *only* if the waiver is granted." 29 U.S.C. § 1083(b)(4) (emphasis supplied).

[7] *See, e.g.*, Senate Debate on Conference Report on H.R. 2, 93d Cong., 2d Sess. (1974), *reprinted in* 3 *Legislative History*,

(Footnote continued on the following page)

funding requirement would do little good for plan participants if enforcement could result in the termination of the pension plan or the destruction of the employer. The fact that almost every major pension reform bill introduced in Congress had some provision for waiver of the annual funding requirement underscores the central role this provision has in furthering the purposes of ERISA.[8]

The Seventh Circuit's decision undermines these ERISA objectives by nullifying Section 303. The severe economic problems experienced by Keystone at the time of the waiver are recognized by the IRS, the arbitrator, the district court and the Union itself. Keystone experienced a financial crisis of destructive proportions which threatened its very existence. Without an immediate and dramatic modification of cash flow requirements, Keystone was faced with drastic alternatives, including termination of some or all of the pension plans, or even the termination of operations. Indeed, by the time the waiver was granted, Keystone already had taken steps to term-

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(Continued from previous page)
at 4802 (remarks of Senator Nelson, noting that "*any* pension fund will have the right to ask for a waiver of the annual payment.") (emphasis supplied); *Id.* at 4813 (remarks of Senator Ribicoff, noting that a "[p]lan could obtain extensions of funding and vesting periods if necessary to avoid 'substantial economic hardship' to plan participants."); *Id.* at 4817 (news article placed in the record by Senator Ribicoff, which noted that the ERISA funding requirements could "push hundreds of employers to terminate plans. To avoid that, the Congress has provided relief in hardship cases. Where the vesting or funding requirements cannot be met without threatening the existence of a pension plan, or the company itself, there are special steps that can be taken.").

[8] *See* S.4, 93d Cong., 1st Sess. § 217 (1973), *reprinted in* 1 *Legislative History*, at 129-31; S.1179, 93d Cong., 1st Sess. § 323 (1973), *reprinted in* 1 *Legislative History*, at 243-44; H.R. 12481, 93d Cong., 2d Sess. § 1013 (1974), *reprinted in* 2 *Legislative History*, at 2435-36; H.R. 12855, 93d Cong., 2d Sess. § 1013 (1974), *reprinted in* 2 *Legislative History*, at 2965-66; H.R. 12906, 93d Cong., 2d Sess. § 501 (1974), *reprinted* in 2 *Legislative History*, at 2904-05.

inate three of its other pension plans. App. 24a. Bluntly stated, the very existence of Keystone and the livelihood of its current and former employees were jeopardized without the waiver.

This substantial business hardship, standing alone, is not enough to invoke Section 303. The ability to recover from these hardships is necessary; otherwise, the interests of plan participants are not advanced. With respect to this requirement, the unrebutted evidence established that Keystone could recover. Thus, all of the section 303 requirements were met. However, to guard against any errors in judgment or abuse of the process, and to provide yet another safeguard mechanism for the interests of plan participants, the IRS imposed a number of conditions on the waiver with the objective of preserving and protecting the interests of plan participants.

This case represents a classic example of how Congress intended Section 303 to operate. The IRS expressly found that Keystone was experiencing serious temporary financial problems and requiring immediate payment of the annual contribution would create substantial business hardship. It further expressly found that Keystone could recover from this hardship. In granting the waiver, the IRS necessarily concluded that it was reasonable to expect that the Pension Plan would be continued *only* if the waiver was granted *and* that application of the annual funding requirement would be adverse to the interests of plan participants.

By granting the desperately needed waiver, the IRS attempted to ensure that the Pension Fund remained available for numerous individuals currently receiving pension benefits. Equally significant, the IRS attempted to ensure that the Pension Fund remained available for future beneficiaries. Because of the enormous financial difficulties experienced by Keystone, the IRS also attempted to allow Keystone the opportunity to remain a viable and ongoing business offering employment opportunities in a severely depressed economic community, Rockford, Illinois. Nobody has been injured by

the waiver; indeed, everyone – including Keystone, plan participants *and* the Union – has benefitted enormously. The Seventh Circuit's decision threatens this carefully crafted and fragile recovery scheme. The waiver was granted because it was reasonable to expect that the plan would be continued *only* if the waiver was granted. 29 U.S.C. § 1083(b)(4). The Court of Appeals nullifies this finding and, in so doing, risks terminating the pension benefits of millions of current and future beneficiaries as well as forcing Keystone to close operations. This bleak scenario is repugnant to the public policies embodied in Section 303.

In its opinion, the Court of Appeals reasoned that ERISA merely establishes minimum standards for payments, and that ERISA does not bar employers from undertaking greater contractual obligations. App. 8a. There are several fatal flaws with this reasoning. The Court of Appeals does not construe the parties' Pension Agreement to *exceed* the ERISA requirements. It merely finds that the Pension Agreement requires annual funding – as does ERISA. But the Court of Appeals goes further and *subtracts* from the statutory protections in ERISA by holding that this annual funding requirement cannot be deferred, thereby nullifying Section 303. An employer theoretically always is free to undertake greater contribution obligations provided that plan participants' interests are not diminished in any respect as a result. Where, however, plan participants' interests are adversely affected when an employer undertakes "greater" obligations – as they plainly are here – that undertaking conflicts with ERISA and must be declared null and void. *Cf.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (provision of state employment discrimination law preempted by ERISA insofar as it prohibited practices that were lawful under federal law).

Succinctly stated, during a period of temporary financial crisis, termination of a pension plan or other drastic retrenchment measures are almost never in the interests of plan participants. Protection of plan participants' interests by

the prevention of unnecessary plan terminations is a compelling public policy interest. Section 303 advances this public policy by providing a reasonable means of protecting plan participants' interests in times of financial hardship, with ample safeguards to prevent abuse. Failing to give full force and effect to Section 303 jeopardizes the interests of each and every pension plan participant as well as future participants. The Seventh Circuit's decision repudiates Section 303 and contravenes clearly defined and settled public policy.

Moreover, by declaring "annual funding" language in a pension agreement to be a waiver of Section 303 rights, the Seventh Circuit has sweepingly denied Section 303 protection to millions of pension plan participants who are covered by pension plans containing this routine contract language. By finding Section 303 rights waivable and by refusing to ascertain what the parties intended by including "annual funding" language – in this case the parties never intended to waive the operation of Section 303, *see* note 5, *supra* – the Seventh Circuit has jeopardized the interests of millions of pension benefit recipients, a result in blatant contravention of congressional intent and the public policies underlying ERISA. To remedy this broad adverse impact, and to provide badly needed guidance regarding the scope and operation of Section 303, this Court should grant review.

B. The Seventh Circuit Misconstrues And Improperly Expands This Court's Decision In W.R. Grace

The Seventh Circuit concluded, with virtually no reasoning or explanation, that this Court's decision in *W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757 (1983), justified its holding that the Section 303 waiver granted to Keystone was null and void because of the language contained in the pension agreement. App. 15a. Because the Seventh Circuit has erroneously construed and expanded this Court's decision, review should be granted so this Court can define the intended scope of *W.R. Grace*.

It is important at the outset to recognize that *W.R. Grace* reaffirmed the "public policy" defense to enforcement of an arbitration award; *i.e.*, "a court may not enforce a collective-bargaining agreement that is contrary to public policy." 461 U.S. at 766. Provided that the public policy is "well defined and dominant," and can "be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests,' " *id.*, a federal court possesses the authority and has the obligation to vacate an arbitration award conflicting with the public policy, a principle even the Union acknowledged before the arbitrator. *See* note 3, *supra*.

The Seventh Circuit's reliance upon *W.R. Grace* fails because it improperly equates two distinct and different statutory schemes which implicate entirely different public policies. In *W.R. Grace*, an employer voluntarily entered into a conciliation agreement with the Equal Employment Opportunity Commission to resolve outstanding charges of racial discrimination. The voluntary agreement in effect modified the seniority provision in the collective bargaining agreement. The union was not consulted regarding this modification. When layoffs became necessary, they were executed in conformity with the conciliation agreement and not the seniority provision of the labor contract. Several laid off employees filed grievances claiming that the employer had violated the labor contract. The arbitrator found in favor of the laid off employees and that award eventually was upheld by this Court over arguments by the employer that the award should be vacated because it conflicted with public policy, *i.e.*, the promotion of voluntary conciliation under federal employment discrimination laws.

The central reason underlying this Court's decision was the fact that the employer's layoff selection dilemma was voluntarily created by the employer itself. 461 U.S. at 769-70. Thus, the Court was extremely reluctant to accept the employer's public policy defense because the alleged conflict between the arbitration award and public policy was the

employer's own making and thus avoidable. Furthermore, the Court was unpersuaded that enforcement of the arbitration award would undermine any public policy. In fact, the Court concluded that the public policy relied upon by the employer would be advanced by enforcement of the arbitration award because it would encourage all interested parties to voluntarily participate in conciliation. *Id.* at 771. The Court stated that "the conciliation process of Title VII and the collective-bargaining process complement each other, rather than conflict." *Id.* at 772.

W.R. Grace has no bearing to this case based on the Court's analytical framework. Foremost among the distinctions is that the conflict between Section 303 and the Seventh Circuit's decision is the result of the independent operation of ERISA through the IRS. Section 303 was created to assume preeminent significance over the annual funding requirement of Section 302 and private agreements which impliedly or expressly undermine the effective operation of Section 303. This principle played no role in *W.R. Grace* because Congress never suggested that voluntary conciliation agreements should override any private agreement. Moreover, unlike the voluntary action of the employer in *W.R. Grace* which inadvertently produced the conflict, Keystone was in effect obligated to seek the waiver or risk being found to have breached its fiduciary duties.[9] The interests of plan participants mandated the action and Keystone properly executed its duties. The actions of Keystone cannot be equated with the actions of the employer in *W.R. Grace*.

Second, there is no question in this case that the Seventh Circuit's decision clashes with ERISA. Unlike *W.R. Grace*,

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[9] Articles V and X of the Pension Agreement imposed upon Keystone the functions of administrator and named fiduciary of the Plan, and specifically granted Keystone full authority and responsibility with respect to funding the Plan. As administrator and named

(Footnote continued on the following page)

Section 303 and the arbitration award do not and cannot "complement each other." 461 U.S. at 772. Thus, the threshold requirement for invocation of the public policy defense - an unavoidable clash between a public policy and an arbitration award - was not present in *W.R. Grace* like it is here.

Third, the alleged clash of public policies in *W.R. Grace* was not irreconcilable. As the Court pointed out, the employer could have laid off pursuant to the conciliation agreement and compensated affected employees under the labor contract. Both the conciliation agreement and the collective bargaining agreement could have been satisfied. Thus, the employer never was in the position of selecting between two mutually exclusive options. In stark contrast, the clash of obligations here is irreconcilable; immediate payment of the full contribution cannot be reconciled with payment in fifteen (15) equal installments. More importantly, Keystone cannot make full, immediate contribution without plan participants' interests being adversely affected and the risk of plan termination being substantially increased. Thus, the two cases differ dramatically in terms of the conflict presented and the interests implicated.

Fourth, this Court was strongly influenced by the absence of union consent. It believed that the employer could not be excused for failing to obtain first the union's consent before signing the conciliation agreement. Of course, the absence of union consent also is true here. However, the determinative difference is that union consent is not required in the Section 303 process. *See infra* Section II.

(Continued from previous page)
fiduciary, Keystone was subject to strict fiduciary duties prescribed by Section 404 (a) of ERISA, 29 U.S.C. § 1104(a), including the duty to protect the interests of pension plan participants and beneficiaries. *See, e.g., Marshall v. Snyder*, 1 Employee Ben. Cas. (BNA) 1878, 1886 (E.D.N.Y. 1979); *Winpisinger v. Aurora Corp. of Illinois*, 456 F. Supp. 559 (N.D. Ohio 1978).

Finally, the respective employment benefits being affected are materially different. In *W.R. Grace*, employment itself was being deprived employees. Tangible and substantial injury, both to the Union and the laid off employees, resulted from the employer's actions. Here, on the other hand, because there is no loss of pension benefits to beneficiaries and because Keystone remains obligated for full payment *with interest* of the annual funding requirement, there only is at most a "*de minimus*" and *temporary* abridgement of contract rights. Thus, the essential element of injury, easily identifiable and measureable in *W.R. Grace*, is not present in this case.

For all these reasons, *W.R. Grace* does not apply to this case. To the extent it does, *W.R. Grace* actually supports Keystone's claim that the Seventh Circuit's decision irreconcilably conflicts with the public policies embodied in ERISA. *W.R. Grace* reaffirmed the public policy defense and the undeniable fact is that the public policies underlying Section 303 of ERISA are "well defined and dominant" and "ascertained by federal statute," thereby satisfying the *W.R. Grace* standard.

II. THE SEVENTH CIRCUIT'S APPLICATION OF PROCEDURAL DUE PROCESS TO THE SECTION 303 WAIVER PROCESS IMPROPERLY EXPANDS THIS COURT'S HOLDING IN *MATHEWS V. ELDRIDGE* AND CONFLICTS WITH THE *PROCEDURAL SCHEME EXPRESSLY INTENDED BY CONGRESS*

The Seventh Circuit held that the Union was deprived of a protected property interest without due process in violation of the Fifth Amendment because the Section 303 waiver was granted to Keystone without notice and hearing. This holding is erroneous for several reasons. First, it misstates the record evidence because a hearing was held and written findings were issued by the IRS. *See* Petitioner's Appendix to the Seventh Circuit at pp. 39-42. Second, it ignores the extensive legislative history of Section 303. Congress expressly considered and rejected procedures for granting waivers which would have re-

quired hearings, a formal record and findings of fact. *See, e.g.*, H.R. 12855, 93d Cong., 2d Sess. § 1015(b) (1974); H.R. Rep. No. 807, 93d Cong., 2d Sess. 83-84 (1974). Furthermore, Congress considered waiver proposals which would have required union involvement in requesting a waiver (*see, e.g.*, S. 4, 93d Cong., 1st Sess. § 216(c) (1973)), or that would have required notice to all interested parties and an opportunity to be heard before ruling on an employer's application for a waiver. *See, e.g.*, S. 4, 93d Cong., 1st Sess. § 217 (1973); S. 1179, 93d Cong., 1st Sess. § 323 (1973); H.R. 2, 93d Cong., 1st Sess. § 501 (1973); H.R. 12906, 93d Cong., 2d Sess. § 501 (1974). Congress rejected all of those alternatives in enacting Section 303, providing instead for application and input solely by the employer. The Court of Appeals conspicuously ignores this legislative history which establishes that it is contrary to Congress' clearly articulated intent that a full-scale adversarial hearing involving all affected parties be conducted before the waiver is granted. Section 303 was carefully designed to alleviate the procedural formality imposed by the Seventh Circuit which, in times of financial crisis, operates to the detriment of employees and of plan participants.

Third, examining a due process claim involves a balancing of relative interests, including the private interest that will be affected by the official action, the risk of an erroneous deprivation of the private interest through the procedures used, the probable value of additional or substitute procedural safeguards, and the Government's interests. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The Seventh Circuit's due process holding – based on at most a cursory analysis – fails to critically examine these interests. Instead, the Seventh Circuit's holding is premised on the belief that a Section 303 waiver is automatic, abrogates the employer's contribution requirement and does not provide adequate safeguards for the interests of plan participants.[10] These understandings are wrong on all scores.

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[10]The Seventh Circuit relies on *Murphy v. Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982),

(Footnote continued on the following page)

First, Section 303 imposes many stringent requirements which must be satisfied before a waiver can be granted, one of the more important of which is that "it is reasonable to expect that the plan will be continued *only* if the waiver is granted." 29 U.S.C. § 1083(b)(4) (emphasis supplied). Merely seeking a waiver does not guarantee receipt; continuance of the pension plan must be assured, and the waiver must be essential to the survival of the plan and in the interests of plan participants. Second, the Secretary is vested with responsibility for enforcing the ERISA safeguards enacted by Congress for plan participants. An employer can be experiencing the worst of financial times but, without showing that the interests of plan participants would be furthered, it is not entitled to a waiver and the Secretary, serving as the disinterested guardian of plan participants' interests, is there to ensure that plan participants are beneficiaries of the waiver. Third, Keystone is not absolved from making the required contribution. Instead, only the payment schedule is changed – the required payment is simply postponed. Thus, there is serious question whether anyone is being deprived of a property interest. Fourth, although Keystone is permitted to defer the actual contribution, the deferred amount accrues interest. Thus, the employer does not enjoy some special benefit from retention of the contribution amount and plan participants are deprived of none. Fifth, in the event the Pension Plan is terminated before July 1, 1985, the waiver becomes null and void. Thus, Keystone is prevented from taking short-term financial advantage of the waiver to the later detriment of plan par-

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in support of its argument that the pension agreement supersedes Section 303. This argument demonstrates how badly the Court of Appeals missed the mark in this case. In simplest terms, there was no conflict in *Murphy* between the contract and ERISA. Indeed, enforcement of the contract promoted the public policies underlying ERISA. In contrast, here there is an irreconcilable conflict between the arbitrator's award and Section 303, and Congress has declared that the latter supersedes. Thus, *Murphy* has nothing to do with this case.

ticipants. Sixth, there is nothing preventing Keystone from making repayment faster than the 15-year period permitted by ERISA. Finally, a point which deserves reiteration, Keystone does not avoid honoring the Pension Agreement by obtaining a waiver. Keystone legally must fulfill its pension funding obligations, with interest. Rather than immediate payment, however, payment will be made pursuant to the timetable established by statute – a timetable which allows Keystone an opportunity to survive and at the same time preserve and protect the interests of plan participants.[11]

In sum, when the interests of plan participants (preserving pension funds) are weighed against the interest of the Union (rigid compliance with a contractual requirement), the balance clearly falls in favor of the former and Congress has so declared. Moreover, the numerous safeguards which Congress has included in the waiver granting process and which were applied here amply protect the interests of all plan participants and beneficiaries. The Section 303 waiver process fully comports with the requirements of the Fifth Amendment. Because the Seventh Circuit's decision is squarely at odds with *Mathews* and with this Court's recent decision in *Connolly v. Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018 (1986) (Multiemployer Pension Plan Amendments Act's withdrawal

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[11] The potential importance of Section 303 in preserving plans which otherwise might be terminated is best illustrated by statistics regarding the latter. According to its 1983 annual report, the Pension Benefit Guaranty Corporation experienced a $195.6 million net operating loss for its termination insurance programs during fiscal 1983, primarily as a result of unusually large losses on plan terminations. Furthermore, termination notices numbered near 7,000. *See* Daily Lab. Rep. No. 163 (BNA, August 22, 1984).

liability provision does not violate Fifth Amendment),[12] review should be granted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the decision of the Seventh Circuit reversed.

Respectfully submitted,

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[12] The Seventh Circuit in dicta also suggested that the waiver was ineffective because the IRS lacked Article III powers, relying on *Northern Pipeline* in which this Court declared unconstitutional that provision of the federal bankruptcy laws which vested in bankruptcy judges powers constitutionally vested exclusively in Article III judges. This dicta is clear error. The IRS was not acting in an Article III capacity when it granted the Section 303 waiver. Rather, it was acting as an administrative agency with authority granted by Congress to enforce ERISA, and not any private rights. Thus, the decision is plainly wrong and, if allowed to stand, will cripple the IRS in fulfilling its statutory obligations.

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1722

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, and ITS LOCAL 449,

Plaintiffs-Appellees,

v.

KEYSTONE CONSOLIDATED INDUSTRIES, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 82 C 20189—Stanley J. Roszkowski, *Judge.*

ARGUED JANUARY 23, 1985—DECIDED JUNE 12, 1986*

Before COFFEY and FLAUM, *Circuit Judges*, and JAMESON, *Senior District Judge.*[1]

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* The panel, with Judge Coffey dissenting, issued an opinion reversing the District Court on February 3, 1986. The appellee filed a Petition for Rehearing with Suggestion for Rehearing *en banc* and the Tax Division of the Department of Justice submitted an amicus brief in support of the appellee's Petition for Rehearing. Upon reconsideration, the panel voted to withdraw the opinion issued February 3, 1986 and to issue an opinion affirming the District Court.

[1] The Honorable William J. Jameson, Senior District Judge for the District of Montana, is sitting by designation.

COFFEY, *Circuit Judge.* Keystone Consolidated Industries, Inc. appeals the district court's enforcement of an arbitrator's award requiring Keystone to make annual contributions to a pension plan pursuant to a collective bargaining agreement, even though the company had obtained a waiver of the minimum funding obligation imposed by Section 302 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1082. We affirm.

I.

The International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (the "Union") and the National Lock Division of Keystone Consolidated Industries, Inc. ("Keystone") have been parties to a series of pension agreements since 1955. Beginning in 1968 and continuing to the present, these pension agreements provided that Keystone shall make annual contributions to the pension's trust fund. The pension agreement between Keystone and the Union provided in relevant part:

> The Company agrees to make contributions to the [pension] trust fund on an annual basis during the term of this Agreement in the amount of . . . [sums] determined by the independent actuary employed by the company in the valuation of the pension plan:. . . ."

In June 1981, Keystone issued a summary annual report to the pension plan's participants, the members of the Union, as required by ERISA. In this report, Keystone revealed that in December 1980, on the advice of its accountants, it had applied to the Internal Revenue Service ("IRS") for a waiver of its 1979-1980 pension plan contribution. To obtain a temporary waiver of the ERISA annual minimum funding obligation from the IRS, the employer must demonstrate

> "(1) The employer is operating at an economic loss,
>
> (2) There is substantial unemployment or underemployment in the trade or business and in the industry concerned,

(3) The sales and profits of the industry concerned are depressed or declining and,

(4) It is reasonable to expect that the plan will be continued only if the waiver is granted."

29 U.S.C. § 1083(b). If the IRS grants the temporary waiver, the company in subsequent years must contribute, "the amount necessary to amortize each waived funding deficiency (within the meaning of section 1083(c) of this title) for each prior plan year in equal annual installments (until fully amortized) over a period of 15 plan years." *Id.* at 1082(2)(C). The summary annual report to the pension plan participants issued by Keystone revealed that the Internal Revenue Service had granted Keystone's request for a waiver of its annual contribution under ERISA based on evidence presented by Keystone alleging that it had suffered a net loss of almost $3.5 million for the fiscal year beginning on July 1, 1979, and a net loss of over $2.5 million in the following year, due to serious downturns in the industries to which it sold its products. Additionally, the IRS found that Keystone was experiencing great difficulty in maintaining sufficient working capital to prevent a technical default of its prime loan obligations to the Continental Illinois National Bank. However, the IRS concluded that Keystone would in all probability be able to recover from its present financial difficulties as a result of its modernization efforts and its program to reduce costs.

In September 1981, the Union filed grievances with an arbitrator pursuant to the Union's collective bargaining agreement with Keystone, alleging that Keystone had violated the annual funding provision of the pension agreement by failing to make its contribution to the plan for the 1979-1980 plan year. After the arbitrator held an evidentiary hearing and reviewed the parties' briefs, he issued an award in favor of the Union and ordered Keystone to pay $2,147,932 to the pension fund with interest at 8% per year from July 1, 1980, until paid. The parties became involved in a dispute as to when the award was due to be paid, after the issuance of the arbitrator's deci-

sion. The Union claimed that the award required the immediate payment of the full amount, while Keystone claimed that the award required full payment in conformity with the fifteen-year equal installment payment schedule, as set forth for in ERISA. As a result of this dispute over the interpretation of the arbitrator's award, the Union filed suit under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982), to have the district court enforce the arbitrator's award.

On June 16, 1983, the district court denied both the Union's and Keystone's motions for summary judgment without prejudice and remanded the case to the arbitrator for clarification of the language in the award. The arbitrator clarified his decision on July 5, 1983, explaining that Keystone was to pay the 1979-1980 plan year contribution immediately because Article VI, section 2 of the pension agreement specifically provided that: "The Company agrees to make contributions to the trust fund on an annual basis. . . ." Both parties renewed their motions for summary judgment to the district court, and Keystone argued that the court should not enforce the arbitrator's award because the award directly conflicted with and nullified the waiver provision of ERISA. On February 27, 1984, the district court granted the Union's motion for summary judgment and enforced the arbitrator's award.

On appeal, Keystone argues that the district court erred as a matter of law in enforcing the arbitrator's award because the award conflicts with the public policies embodied in ERISA. Keystone claims that the safeguards embodied in the waiver provision of ERISA cannot be overridden by a pension agreement because these safeguards were enacted for the benefit of the participants of the pension plan. Additionally, Keystone contends that compelling an employer to honor a contractual obligation to make pension plan contributions when the IRS has granted a waiver of the ERISA minimum funding requirements because of the dire financial status of the business would violate public policy because enforcement of the contract provision risks an unnecessary termination of the pension plan.

I.

At the outset, we note that there were two sources of Keystone's annual funding obligation. Section 302 of ERISA (29 U.S.C. § 1082) provides:

> "(1) Every employee pension benefit plan subject to this part shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 1085 of this title) for any plan year to which this part applies. A plan to which this part applies shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year the plan does not have a cumulative funding deficiency."

The purpose of the ERISA minimum funding requirements is to insure that pension plans will accumulate sufficient assets within a reasonable time to pay promised benefits to covered employees when they retire. *See* H.R. Conf.Rep. No. 93-1280, 93d Cong., 2d Sess. 283, 1974-3 Cum.Bull. 415, 444. ERISA's funding standards are enforced under provisions of the Internal Revenue Code. 26 U.S.C. § 4971(a). If, at the end of a plan year, the employer has failed to make the minimum contributions necessary to meet the funding requirements of Section 302 of ERISA, § 4971 imposes a nondeductible, 5% excise tax on the amount of the accumulated funding deficiency. *Id.* If the funding deficiency is not corrected, an additional tax equal to 100% of the deficiency is imposed. *Id.* at § 4971(b). Neither the initial 5% excise tax nor the additional 100% tax is deductible for federal income tax purposes. *Id.* at § 275(a)(6).[2] Although the minimum funding standards

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[2] When collective bargaining agreements are involved, the Internal Revenue Code provides:

> "the liability under section 4971 [imposing the funding tax] of each employer who is a party to the collective bargaining agreement shall be determined in a reasonable manner not inconsistent with regulations prescribed by the Secretary—

(Footnote continued on following page)

were imposed by Congress to minimize the loss of benefits to participants in inadequately funded plans, Congress recognized that enforcement of the ERISA minimum funding requirement could cause financially troubled employers to terminate their plans rather than subject themselves to the funding taxes imposed on funding deficiencies. *See* H.R. Rep.No. 93-779, 93d Cong., 2d Sess. 80, 1974-3 Cum. Bull. 244, 323. To avoid plan terminations, Congress authorized the IRS to temporarily waive the minimum funding requirement in cases of economic hardship. 29 U.S.C. § 1083(a).

In addition to the ERISA minimum funding obligation, an employer's annual contribution obligation may be contained in a collective bargaining agreement. 29 U.S.C. § 186(c)(5-8). Article VI § 2 of the Pension Agreement between Keystone and the Union recites in pertinent part: "The Company agrees to make contributions to the trust fund on an annual basis during the terms of the Agreement."

Keystone argues that § 303 of ERISA, the ERISA minimum funding waiver provision, limits Keystone's and the Union's rights to contract during the collective bargaining process for continued annual funding of the pension plan when the IRS has granted a waiver of the ERISA minimum funding requirement. According to Keystone, the parties' liberty to contract is limited by ERISA because a contractual promise to continue annual funding of the pension plan even though the IRS has temporarily waived the ERISA minimum funding requirement would force the employer into financial ruin and jeopardize the

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[3] *continued*

> (A) first on the basis of their respective delinquencies in meeting required employer contributions under the plan, and
>
> (B) then on the basis of their respective liability for contributions under the plan."

Id. at 413(b)(6).

pension plan. In addressing the issue of whether ERISA limits the parties' rights to contract in collective bargaining agreements, we note that ERISA "does not regulate the substantive content of welfare-benefit plans." *Metropolitan Life Ins. Co. v. Mass.*, ____ U.S. ____, 105 S.Ct. 2380, 2385 (1985). *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). In *Murphy v. Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), the Third Circuit addressed the question of whether 29 U.S.C. § 1362 and 1322, limiting the employer's liability to the Pension Benefit Guaranty Corporation "place a cap on, respectively, the employer's liability for pension benefits, and the employees' right to receive employer-funded benefits." *Id.* at 237. "The employer maintain[ed] the federally-insured pension benefits set out in Title IV of ERISA, 29 U.S.C. § 1301-81 afford[s] employees all the pension rights to which they are entitled," and that section 1362 and 1322, placing a cap on liability to the PBGC, evinced Congress intent to limit the beneficiaries pension rights. The court noted that the sections 1362 and 1322 "in no way address pension benefits directly recoverable from the employer." *Id.* at 237-38. Based upon not only the statutory language but also upon the Act's legislative history, as summarized in *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980), the Third Circuit concluded that §§ 1362 and 1322 did "not limit the employer's direct contractual liability to employees," 635 F.2d at 237-38, and that its holding was "not inconsistent with the statutory scheme to permit employees to recover directly from the employer any additional benefits to which the employer has contractually obligated itself." *Id.* at 239. *See also In the Matter of M&M Transportation Co.*, 3 B.R. 722 (S.D.N.Y 1980); *In Re Alan Wood Steel Co.*, 5 B.R. 620 (Bkrtcy E.D. Pa. 1978). Similar to the analogous situation faced by the Third Circuit in *Murphy*, we have failed to discover any language in the legislative history of section 303 that would limit the contractual obligation of Keystone to fund its pension plan pursuant to the negotiated collective bargaining agreement. In *Murphy*, the court further held that § 1144 of ERISA, the preemption section, preempts state

law but does not supercede the federal common law of labor-management contracts. *Id.* at 237. Indeed, ERISA expressly provides that an employer's failure to make a pension plan contribution agreed upon in a collective bargaining agreement violates ERISA:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

29 U.S.C. § 1145.[3] Suits to enforce pension rights obtained under a collective bargaining agreement may be brought under ERISA, 29 U.S.C. § 1132, or under § 301 of the Labor-Management Relations Act, ("LMRA") 29 U.S.C. § 185. *Bugher v. Feightner*, 722 F.2d 1356, 1361 (7th Cir. 1983) (Wood, J., concurring); *see e.g., Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982). Our court has held that the ERISA enforcement section, § 1132, "was intended to supplement rather than supersede the rights existing under 29 U.S.C. § 185. . . . " *Ind. State Council of Roofers v. Adams Roofing*, 753 F.2d 561, 563 (7th Cir. 1985); *Bugher*, 722 F.2d at 1359, *see also Kaiser Steel*, 455 U.S. at 87. Based upon not only the statutory language of ERISA sections 1132 and 1145 but also the cases addressing the relationship of ERISA to the LMRA, we hold that ERISA does not forbid parties to collectively bargain for obligations greater than, and separate from, the ERISA minimum funding obligations.

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[3] The Supreme Court has interpreted the statutory phrase "to the extent not inconsistent with law" as meaning that courts will not enforce collectively-bargained payment obligations that would "lead to" situations condemned by law, or that would allow a party to "reap the fruits" of illegal collective-bargaining provisions, such as violations of the Labor Management Relations Act, the antitrust laws, or the National Labor Relations Act.

We now turn to the question of whether the arbitrator's award violated public policy. Keystone bases its public policy argument on the observation that the well-defined and dominant public policy embodied in ERISA is to protect plan participants from the unnecessary termination of their pension plans. Keystone reasons that because the IRS found that it faced a "substantial business hardship," the arbitrator's refusal to permit it to rely on the payment schedule outlined in ERISA's waiver provision jeopardized the continued existence of Keystone's pension plan, to the serious detriment of the plan participants. Keystone concludes that because the arbitrator jeopardized the continued existence of the pension plan in refusing to allow Keystone to rely on the payment schedule outlined in the ERISA waiver provision, he violated public policy.

Initially, we note that an examination not only of the legislative history of ERISA but also the statutory language fails to reveal that Congress intended to authorize the IRS to relieve an employer of its contractual obligation to contribute to its employees' pension plan. The statute provides that the Secretary of the Treasury "may waive *the requirements of section 1082(a) of this title*" (emphasis added); the statute fails to specify that the Secretary may waive contractual funding requirements contained in pension agreements between private parties. Moreover, the application for the waiver is made by the employer and the statute fails to provide for giving notice or an opportunity to be heard to the beneficiaries. *See* Rev. Proc. 83-41, 1983-1 Cum. Bull. 775. The Justice Department argues, and we agree, that there are two reasons for granting waivers on an *ex parte* basis without providing advance notice to plan participants. First, since the employer's waiver application contains tax return information, disclosure of the application would violate Section 6103 of the Internal Revenue Code prohibiting the disclosure of tax return information. Secondly, involvement of the plan participants or their bargaining representative in the waiver process would be administratively cumber-

some. The statute requires the Secretary to consider whether:

> "(1) The employer is operating at an economic loss,
>
> (2) There is substantial unemployment or underemployment in the trade or business and in the industry concerned,
>
> (3) The sales and profits of the industry concerned are depressed or declining and,
>
> (4) It is reasonable to expect that the plan will be continued only if the waiver is granted."

29 U.S.C. § 1083(b). However, the statute does not provide beneficiaries with an opportunity to present evidence on these issues, and furthermore, the Secretary is not required to provide a written record in support of his decision. Moreover, it is apparent that Keystone's reasoning rests on the assumption that the IRS determination was necessarily fair and accurate; on the other hand, if the IRS decision to waive the ERISA minimum funding requirement was in fact, inaccurate, the arbitrator did not violate public policy by requiring Keystone to make the annual contributions set forth in the Pension Agreement. The Justice Department argues, and we agree, that enforcement of an employer's contractual funding obligations is not in violation of any policy provision of ERISA. On the basis of this statutory scheme, we reject Keystone's argument that the IRS' determination of the employer's obligations under ERISA should be determinative of the contractual rights of private parties since the statute is structured to temporarily waive only the statutorily created right to minimum pension funding.

The Union also raises two persuasive constitutional objections, based upon their right to due process and on separation of powers, to Keystone's contention that the IRS' decision to waive the ERISA minimum funding requirements nullifies their contractual right to an annual contribution under the pension agreement. Initially, we address the Union's due process argument that Keystone's

interpretation of ERISA (that an IRS waiver of the ERISA minimum funding requirement also acts as a waiver of the contractual obligation to annual funding) violates their due process rights to notice and to be heard. Because the statute does not require the IRS to conduct a formal trial-type hearing in determining whether to grant a waiver of the ERISA minimum funding requirements, the decision whether to grant the waiver is more properly classified as an "informal" agency action. Although the applicable statutes and regulations may permit an agency to act informally, the agency's informal temporary waiver determination procedure must still provide due process to those whose rights will be adversely affected by its decision in order to comply with the Fifth Amendment's mandate that a person must not be deprived of his "liberty, or property, without due process of law." *Mathews v. Eldridge*, 424 U.S. 319 (1976). In addressing a due process challenge to an informal agency decision based on the deprivation of a property interest, the court must ascertain:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedurals requirement would entail."

Mathews, 424 U.S. at 335. Thus, to determine whether Keystone's interpretation of the Act (arguing that the IRS decision to allow a waiver of the ERISA annual minimum funding requirement also waives the contractual minimum funding requirement) violates due process, we examine the IRS waiver procedure to ascertain the danger of an erroneous deprivation of the contractual right to minimum funding; the probable value of additional or substitute safeguards; and, the Government's interest, including the function involved and the fiscal and administrative burdens

that the additional or substitute safeguards would entail. *Mathews*, 424 U.S. at 335. In essence, the statute requires the Secretary of the Treasury to make two separate and distinct evidentiary determinations before granting a waiver of the ERISA minimum funding requirement: (1) the employer is facing a substantial business hardship and (2) that granting a waiver of the ERISA minimum funding requirements would be in the interest of the plan participants. *See*, 29 U.S.C. § 1083(b). If the IRS grants the waiver, the company must, in subsequent years, contribute, "the amount necessary to amortize each waived funding deficiency (within the meaning of section 1083(c) of this title) for each prior plan year in equal annual installments (until fully amortized) over a period of 15 plan years." *Id.* at 1082(2)(C). In the instant case, the IRS' grant of the temporary waiver of the ERISA minimum funding requirement stated:

> "The information submitted with the request and at an informal conference shows that the Company has suffered a substantial loss for the Company's fiscal year ended June 30, 1980, for a variety of reasons, most of which relate to serious downturns in the industries to which it sells its products, including the automotive industry, housing and agriculture. Further, the Company continues to experience a serious problem maintaining a sufficient amount of working capital to prevent technical default under its prime loan obligations.
>
> The Company has nevertheless managed to continue its modernization program so that it can be positioned to take best advantage of turnarounds in the industry it serves. The Company has also pared costs and has reduced future benefit accruals under one of the largest pension plans it maintains. For these reasons, we believe the Company can recover from its present hardship and have therefore granted these waivers."

An analysis of these reasons reveals that although some of the facts on which the IRS relied may not be subject to serious dispute (*i.e.*,—"the downturns in the industries

to which it sells its products"), other factual findings could be the subject of vigorous debate (*i.e.*,—whether the company "has . . . managed to continue its modernization program so that it can be positioned to take best advantage of turnarounds in the industry it serves" and whether "the Company can recover from its present hardship"). Moreover, under Keystone's approach the government's interest in making a fair and accurate determination of whether to grant a temporary waiver of the *ERISA* minimum funding requirement would be expanded to include an interest in making a fair and accurate determination of whether to grant a temporary waiver of the *contract's* minimum funding requirement. We hold that the beneficiaries' contract rights cannot be nullified by an IRS ERISA minimum funding temporary waiver determination because the IRS ERISA minimum funding waiver procedure fails to grant the beneficiaries (who have a contractual right to an annual contribution from the company) the right to notice and an opportunity to be heard.

As a second constitutional objection to Keystone's public policy argument, the Union directs our attention to the following passage in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982):

> "[A] matter of public rights must at a minimum arise 'between the government and others.' . . . In contrast, 'the liability of one individual to another under the law as defined' . . . is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. . . . Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power."

458 U.S. at 69-70 (emphasis in original) (citations omitted). The plurality in the *Marathon* decision held that the principle of separation of powers embodied in Article III of the Constitution permits legislative courts (non-Article III courts) in three situations: (1) territorial courts; (2) courts-marshals; (3) legislative courts and agencies established to

enforce "public rights." The plurality defined "public rights" as "matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.' " *Marathon*, 458 U.S. at 67-68. The Supreme Court stated that no case arising between two individuals could be characterized as one of public rights. *Id.* at 68-72. Although the *Marathon* decision addressed the constitutionality of bankruptcy courts, courts have applied its reasoning to administrative agencies, *see, e.g.*, *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir. 1983), and commentators agree that the decision may be applied to administrative agencies if an agency adjudication attempts to resolve private rights. See, e.g., Forward—The Supreme Court, 1981 Term, 96 Harv.L.Rev. 257-68 (1982); Redish, Legislative Courts, Administrative Agencies, and the *Northern Pipeline* Case Decision, 1983 Duke L.J. 197 (1983). An " 'adjudication' means agency process for the formulation of an order." 5 U.S.C. § 551(7). An " 'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule-making but including licensing." *Id.* at (6). Because the IRS' grant of a temporary waiver of the ERISA minimum funding requirement is "a final disposition of an agency matter other than rule making," it is an adjudication; the IRS acts in a judicial function when determining whether to grant a waiver of the ERISA minimum funding requirement. Under Keystone's argument, the IRS' decision to grant a temporary waiver of the ERISA minimum funding requirement nullifies the beneficiaries' contract right to an annual contribution because an attempt to enforce the contract right would be violative of public policy; in effect, under Keystone's public policy argument, the IRS determines contract rights between private parties, *i.e.*, whether an attempt to enforce the contract right to an annual contribution would violate public policy. Thus, we reject Keystone's public policy argument because it would improperly place the IRS into the role of impermissibly wielding Article III power in determining the contract rights between private parties.

We hold that the relationship between the IRS' procedure for waiving the ERISA minimum funding requirement and the collective bargaining agreement is analogous to the relationship between the Equal Employment Opportunity Commission and collective bargaining agreements:

> "Absent a judicial determination, the commission [EEOC], not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent. Permitting such a result would undermine the federal labor policy that parties to a collective bargaining agreement must have reasonable assurance that their contract will be honored."

W.R. Grace & Co. v. Local Union 759, ____ U.S. ____, 103 S.Ct. 2177, 2186 (1983); *see also*, 126 Cong. Rec., at 20180 (remarks of Sen. Williams) ("It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on an employer's contribution promises. [P]lan participants for whom the employer promises to make pension contributions to the plan in exchange for their labor are entitled to rely on their employer's promises."). The Supreme Court's ruling in the well-reasoned *Grace* decision mandates that neither the company nor the IRS could alter the collective bargaining agreement without the beneficiaries' consent.

The decision of the district court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1722

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, and ITS LOCAL 449,

Plaintiffs-Appellees,

v.

KEYSTONE CONSOLIDATED INDUSTRIES, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 82 C 20189—**Stanley J. Roszkowski**, *Judge.*

ARGUED JANUARY 23, 1985—DECIDED FEBRUARY 3, 1986

Before COFFEY and FLAUM, *Circuit Judges*, and JAMESON, *Senior District Judge.**

FLAUM, *Circuit Judge.* The issue presented in this case is whether the district court erred in enforcing an arbitrator's award requiring the defendant employer to make annual contributions to a pension plan even though the employer had obtained an *ex parte* waiver of the plan's annual minimum funding requirement pursuant to

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* The Honorable William J. Jameson, Senior District Judge for the District of Montana, is sitting by designation.

section 303 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1083 (1982). We reverse.

I.

The International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America (the "Union") and the National Lock Division of Keystone Consolidated Industries, Inc. ("Keystone") have been parties to a series of pension agreements since 1955. Beginning in 1968 and continuing to the present, these pension agreements have provided that Keystone shall make contributions to the pension's trust fund on an annual basis. The amount that Keystone must contribute each year is calculated according to the language of the agreement.

In June 1981, Keystone issued a summary annual report to the pension plan's participants, the members of the Union, as required by ERISA. In this report, Keystone revealed that it had sought a waiver of its 1979-1980 pension plan contribution in December 1980 on the advice of its accountants pursuant to section 303 of ERISA, 29 U.S.C. § 1083 (1982). This provision empowers the Secretary of the Treasury to waive ERISA's statutory minimum funding requirement for a given plan year after the Secretary considers the financial condition of the employer and the effect of such a waiver on the employees. 29 U.S.C. § 1083(a). The amount that is waived pursuant to section 303 is then paid back into the plan over a fifteen-year period. § 1082 (b)(2)(C). The report issued by Keystone revealed that the Internal Revenue Service ("IRS"), acting on behalf of the Secretary of the Treasury, had granted Keystone's request for a waiver of its annual contribution based on evidence that Keystone was experiencing severe financial difficulties in 1979 and 1980. At that time, Keystone had suffered a net loss of almost $3.5 million for the fiscal year beginning on July 1, 1979, and a net loss of over $2.5 million in the following year due to serious downturns in the industries to which it sold

its products. The IRS found that Keystone was experiencing great difficulty in maintaining a sufficient amount of working capital to prevent a technical default under its prime loan obligations to the Continental Illinois National Bank. However, the IRS concluded that Keystone would probably be able to recover from its temporary financial difficulties as a result of its modernization efforts and its program to reduce costs.

In September 1981, the Union filed grievances with an arbitrator pursuant to the Union's collective bargaining agreement with Keystone, alleging that Keystone had violated the annual funding provision of the pension agreement by failing to make its contribution to the plan for the 1979-1980 plan year. After the arbitrator held an evidentiary hearing and reviewed the briefs submitted by the parties, he issued an award in favor of the Union and ordered Keystone to pay $2,147,932 to the pension fund with interest at 8½% per year from July 1, 1980, until paid. After the issuance of the arbitrator's decision, the parties became involved in a dispute as to when the award was to be paid. The Union claimed that the award required the immediate payment of the full amount, while Keystone claimed that the award required payment of the full amount, but in conformity with the fifteen-year equal installment payment schedule as provided for in ERISA. As a result of this dispute over the construction of the arbitrator's award, the Union filed suit under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1982), to have the district court enforce the award.

On June 16, 1983, the district court denied both the Union's and Keystone's motions for summary judgment without prejudice and remanded the case to the arbitrator for clarification of the award. However, the district court did state that while ERISA sets minimum standards for contributions to pension plans, it does not prohibit an employer from undertaking greater contractual obligations in a pension agreement. On July 5, 1983, the arbitrator explained that Keystone was to pay the 1979-1980 plan year contribution immediately because Article VI, section

2 of the pension agreement specifically provided that: "The Company agrees to make contributions to the trust fund on an annual basis . . . . " Both parties then renewed their motions for summary judgment before the district court. The Union requested that the district court enforce the arbitrator's decision. Keystone argued that the court should not enforce the arbitrator's award because the award directly conflicted with and nullified the waiver provision of ERISA. On February 27, 1984, the district court granted the Union's motion for summary judgment in a minute order, relying on the reasons that it had specified in its June 16, 1983 order.

On appeal, Keystone argues that the district court erred as a matter of law in enforcing the arbitrator's award because the award conflicts with the public policies embodied in ERISA. Keystone claims that the safeguards embodied in the waiver provision of ERISA cannot be overridden by a pension agreement because these safeguards were enacted for the benefit of pension plan participants.

II.

Since arbitration has been generally favored by the courts as a means of resolving labor disputes, this circuit has held that a court's review of an arbitration award is extremely limited. *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 183 (7th Cir. 1985); *Amalgamated Meat Cutters & Butcher Workmen v. Jones Dairy Farm*, 680 F.2d 1142, 1144 (7th Cir. 1982). *Accord Amalgamated Meat Cutters & Butcher Workmen v. Great Western Food Co.*, 712 F.2d 122, 124 (5th Cir. 1983). The Supreme Court has emphasized that under the well-established standards for the review of labor arbitration awards, a court must not refuse to enforce such an award merely because the court believes that its own interpretation of the collective bargaining agreement at issue would be preferable to that of the arbitrator. *W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 764 (1983). The

Court has noted that the federal policy of settling labor disputes by arbitration would be undermined if courts could finally determine the merits of arbitration awards. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). Thus, the Court has concluded that even if the arbitral award is ambiguous, a court must enforce the award without reviewing the merits of the dispute unless the award does not draw its essence from the collective bargaining agreement. *W.R. Grace v. Local Union*, 461 U.S. at 764 (citing *United Steelworkers v. Enterprise Wheel*, 363 U.S. at 597).

Even though courts have acknowledged that their role in reviewing arbitration awards is limited, they have also noted that their role is not a meaningless part of the arbitral process. *See, e.g., Sea-Land Services, Inc. v. International Longshoremen's Ass'n*, 625 F.2d 38, 42 (5th Cir. 1980). The Supreme Court has held that one of the bases that a court can rely on in declining to enforce an arbitration award is that the award is contrary to public policy. *W.R. Grace v. Local Union*, 461 U.S. at 766. *See Amalgamated Meat Cutters v. Great Western*, 712 F.2d at 124-26 (arbitrator's award directing employer to reinstate a truck driver caught drinking liquor on duty violates public policy and should not be enforced); *Amalgamated Meat Cutters v. Jones Dairy*, 680 F.2d at 1144-45 (court declined to enforce on public policy grounds an arbitrator's award approving of a company's work rule that prohibited employees from reporting unsanitary working conditions directly to inspectors for the United States Department of Agriculture). However, the Court has stressed that such a public policy must be well-defined and dominant before a court can decline to enforce an award on public policy grounds. *W.R. Grace v. Local Union*, 461 U.S. at 766. *See also Amalgamated Meat Cutters v. Jones Dairy*, 680 F.2d at 1145. The Court has noted that public policy can be ascertained by reference to the Constitution, treaties, federal statutes, and applicable legal precedents rather than by reference to general considerations of supposed public interests. *W.R.*

Grace v. Local Union, 461 U.S. at 766; *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948); *Muschany v. United States*, 324 U.S. 49, 66 (1945). Before declaring that an arbitral award violates public policy, however, courts have noted that extreme caution should be exercised in determining what that public policy is. *Amalgamated Meat Cutters v. Great Western*, 712 F.2d at 124; *Union of Transportation Employees v. Oil Transport Co.*, 591 F. Supp. 439, 443 (N.D. Tex. 1984). We hold that the arbitrator's refusal in the present case to apply the waiver provision of ERISA when interpreting the annual funding requirement of the pension agreement violated the clearly defined public policy behind the enactment of ERISA.

The Supreme Court has held that one of Congress's central purposes in enacting ERISA in 1974 was to prevent the loss of all retirement savings by employees whose vested benefits in a pension plan are not paid when their employer terminates the plan. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 374 (1980). In its findings and declaration of policy, Congress noted that the growth in the size, scope, and number of employee benefit plans in recent years had been rapid and substantial, that the operational scope and economic impact of such plans was increasingly interstate, that the continued well-being and security of millions of employees and their dependents were directly affected by these plans, that these plans had become an important factor affecting the stability of employment and the successful development of industrial relations, and that these plans had stimulated the interest of the public at large. 29 U.S.C. § 1001 (1982). Congress thus decided that it had to provide minimum standards for such plans in order to assure their equitable character and their financial soundness, to promote the interests of employees and their beneficiaries, to protect the revenue of the United States, and to provide for the free flow of commerce. *Id.* The Supreme Court concluded from this clear expression of legislative intent that Congress wanted to guarantee that an employee would receive any defined pension benefits to which he was entitled by providing

for a minimum funding schedule and by prescribing standards of conduct for plan administrators. *Nachman v. Pension Benefit*, 446 U.S. at 375. *See also* H.R. Rep. No. 779, 93d Cong., 2d Sess. 80, *reprinted in* 2 *Legislative History of the Employee Retirement Income Security Act of 1974*, at 2669 (1976). The Court has stressed that there is no doubt as to what Congress intended in enacting ERISA: to discourage unnecessary termination of pension plans. *Nachman v. Pension Benefit*, 446 U.S. at 386.

Section 302 of ERISA provides that contributions to a pension plan must be made on an annual basis in order to satisfy the minimum funding standards. 29 U.S.C. § 1082. However, section 303 allows an employer to obtain a waiver of the minimum funding standards from the Secretary of the Treasury if the employer is unable to satisfy these standards for a particular plan year "without substantial business hardship and if application of the standard would be adverse to the interests of plan participants in the aggregate." 29 U.S.C. § 1083(a).[1] In

[1] In its brief before this court, the Union makes a half-hearted attempt to argue that because the IRS granted the section 303 waiver to Keystone without giving the plan participants or the Union any notice or an opportunity to appear at a hearing and without issuing any written findings, the employer's receipt of an *ex parte* waiver from the IRS violated the Union's Fifth Amendment right to due process. The Union also makes a vague argument that the IRS had no power to grant the waiver because it is an Article I agency and not an Article III court, and thus that it cannot resolve private contractual disputes affecting private rights.

We decline to review these arguments because the Union failed to raise them before the district court decided the issue to which they were addressed. *See Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1333 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977). Prior to the June 16, 1983 decision issued by the district court, the Union submitted the following three memoranda of law: one in support of its motion for summary judgment, one in opposition to defendant's motion to dismiss and/or for summary judgment, and one in reply to defendant's opposition to plaintiffs' motion for summary judgment. Although Keystone focused directly on

(Footnote continued on following page)

deciding whether the employer will suffer a "substantial business hardship" without a waiver, the provision directs the Secretary to consider the following factors: (1) whether the employer is operating at an economic loss, (2) whether there is substantial unemployment or underemployment in the trade or business and in the industry concerned, (3) whether the sales and profits of the industry concerned are depressed or declining, and (4) whether it is reasonable to expect that the plan will be continued only if the waiver is granted. § 1083 (b)(1)-(4). If the Secretary grants the waiver, the employer must pay the amount necessary to amortize the waived funding deficiency for each prior plan year in equal annual installments over a period of fifteen plan years. § 1082(b)(2)(C). The employer is also required to pay interest on the outstanding balance of the deferred contributions over the period that the contributions are waived.

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[1] *continued*

ERISA's waiver provision in arguing that public policy would be contravened if the arbitrator's award was interpreted to require immediate payment, the Union never raised its due process or Article I/Article III arguments in response.

On June 16, 1983, the district court rendered a detailed opinion concluding that enforcement of the arbitrator's award requiring immediate payment would not violate public policy. The Union did not raise the above-mentioned additional arguments until September 1983. Presumably because it had already decided the issue, the district court did not issue an additional opinion in granting the Union's motion for summary judgment, but rather cited its June 16, 1983 decision. The Union's insertion of additional arguments after the district court rendered a decision on the pertinent issue, therefore, amounts to nothing more than an attempt to preserve its post-hoc rationalizations for appeal. Moreover, the posture of this case leads us to emphasize the litigant's duty to raise its arguments at the first opportunity. While we are not unmindful of the literal reading accorded pleadings under the Federal Rules of Civil Procedure, the limited role of district courts in the arbitration setting contributes to our conclusion that the Union has waived its right to present these arguments to this court.

In the present case, we believe that enforcement of the arbitrator's award, which declined to apply ERISA's waiver provision, would be contrary to the well-defined and dominant public policy embodied in ERISA—to protect plan participants from the unnecessary termination of their pension plans. It is clear from the financial difficulties that led Keystone to seek the waiver in the first place that the plan participants very likely faced termination of their benefits if the IRS did not grant Keystone the waiver of contributions for the 1979-1980 plan year.[2] This is precisely the situation that ERISA's waiver provision was designed to forestall.

In making its decision to grant the waiver, the IRS thus considered both the degree of business hardship that Keystone would have faced without the waiver and the interests of the plan participants in the aggregate. Furthermore, the IRS placed the following restrictions in its grant of the waiver: (1) the waiver would be rendered null and void if the pension plan was terminated before July 1, 1985, (2) the outstanding balance of contributions would become immediately due if Keystone made any changes in the rate of accrual or vesting of the benefits, and (3) Keystone could not be granted a waiver for more than five of any fifteen consecutive plan years. By refusing to permit Keystone to rely on the payment schedule outlined in ERISA's waiver provision, the arbitrator jeopardized the continued existence of Keystone's pension plan, to the serious detriment of the plan participants. In view of the clear public policy voiced by Congress in enacting ERISA and reiterated by the courts in interpreting ERISA, we must decline to enforce the arbitrator's award requiring

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[2] Keystone administered a total of twenty pension plans. The grave financial situation facing Keystone when it applied for the waiver on the pension plan at issue here is revealed by the fact that Keystone had already taken steps to terminate three of its nineteen other pension plans. In addition, the waiver that the IRS granted Keystone covered the remaining sixteen pension plans administered by Keystone.

Keystone to pay the 1979-1980 plan year contribution immediately.[3]

In conclusion, we reverse the district court's decision enforcing the arbitrator's award.

[3] One could argue that the safeguards embodied in section 303 of ERISA were waived by the parties to the pension plan agreement. We note, however, that the language in the pension agreement in the present case requiring an employer to make annual contributions to the pension plan was first included in the 1968-1971 pension agreement (and has been included in every subsequent pension agreement), which was before ERISA was even enacted. Furthermore, in order for a contract to waive a statutory right, the Supreme Court has held that the general contractual provision must clearly, explicitly, and unmistakably waive the right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Since ERISA was not even enacted when the annual contribution provision of the present pension plan was first drafted and since the provision does not explicitly waive Keystone's right to obtain a variance from the annual contribution requirement, we find that the safeguards embodied in section 303 were not waived and should have been applied. We decline to decide whether an arbitrator's award enforcing a pension agreement that clearly waives an employer's right under ERISA to obtain a variance from the annual contribution requirement would violate public policy.

COFFEY, *Circuit Judge*, dissenting. The majority holds that under the pension agreement, Keystone did not waive its right to obtain a waiver of the ERISA minimum funding requirement from the IRS and that the arbitrator's failure to give effect to the IRS' waiver of the minimum funding requirement violates public policy. In reaching its conclusion, the majority refuses to distinguish between the annual funding requirement contained in the pension agreement and the ERISA minimum funding requirement, set out in 29 U.S.C. § 1082. The validity of the majority's public policy determination depends upon not only the accuracy and fairness of the IRS' determination to grant the waiver of the ERISA minimum funding requirement but also upon the constitutionality of the procedure followed by the IRS in granting the waiver of the ERISA minimum funding requirement. The majority, relying upon an untenable waiver theory, refuses to address the Union's argument that the IRS' procedure for handling requests for waivers of the ERISA minimum funding requirement, which does away with giving the beneficiary notice or a right to be heard, and thus is an unconstitutional deprivation of due process and an unconstitutional delegation of Article III power to an administrative agency. I dissent from the majority's refusal to address these constitutional issues because a review of the record reveals that the Union's due process and Article III arguments were not waived. If we properly reach the constitutional arguments presented by the Union, it is clear that the majority's failure to distinguish between the company's minimum funding obligation under the collective bargaining agreement and under ERISA thrusts the IRS into the unconstitutional role of determining the contract rights of private parties. Moreover, I cannot join the majority's holding that the IRS is the sole and final arbiter of public policy when determining whether to grant a waiver of the ERISA minimum funding requirement because making the IRS the sole and final judge of public policy denies the plan beneficiaries' due process rights to notice and an opportunity to be heard.

I.

At the outset, I note that there were two sources of Keystone's annual funding obligation. Section 302 of ERISA (29 U.S.C. § 1082) provides:

> "(1) Every employee pension benefit plan subject to this part shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 1085 of this title) for any plan year to which this part applies. A plan to which this part applies shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year the plan does not have a cumulative funding deficiency."

ERISA's funding standards are enforced under provisions of the Internal Revenue Code. 26 U.S.C. § 4971(a). If, as of the end of a plan year, there is an accumulated funding deficiency that has not been corrected within the taxable period, the employer will owe a 5% excise tax on the amount of the accumulated deficiency for each year in which the deficiency has not been corrected. *Id.* ("funding tax"). If a 5% excise tax is imposed upon an accumulated funding deficiency and the accumulated funding deficiency is not corrected within the taxable period, an additional tax equal to 100% of the accumulated funding deficiency that has not been corrected is imposed upon the employer, who is required to pay the initial tax. *Id.* at § 4971(b). Neither the initial 5% excise tax nor the additional 100% tax is deductible for federal income tax purposes. *Id.* at § 275(a)(6). When collective bargaining agreements are involved, the Internal Revenue Code provides:

> "the liability under section 4971 [imposing the funding tax] of each employer who is a party to the collective bargaining agreement shall be determined in a reasonable manner not inconsistent with regulations prescribed by the Secretary—
>
> (A) first on the basis of their respective delinquencies in meeting required employer contributions under the plan, and

> (B) then on the basis of their respective liability for contributions under the plan."

Id. at 413(b)(6). An employer may avoid the funding tax by applying to the IRS for a waiver of the ERISA minimum funding obligation. 26 U.S.C. § 412(d)(1). 29 U.S.C. § 1083(a). To obtain a waiver of the ERISA minimum funding obligation, the employer must demonstrate

> "(1) The employer is operating at an economic loss,
>
> (2) There is substantial unemployment or underemployment in the trade or business and in the industry concerned,
>
> (3) The sales and profits of the industry concerned are depressed or declining and,
>
> (4) It is reasonable to expect that the plan will be continued only if the waiver is granted."

29 U.S.C. § 1083(b). If the IRS grants the waiver, the company in subsequent years must contribute, "the amount necessary to amortize each waived funding deficiency (within the meaning of section 1083(c) of this title) for each prior plan year in equal annual installments (until fully amortized) over a period of 15 plan years." *Id.* at 1082(2)(C).

In addition to the ERISA minimum funding obligation, an employer's annual contribution obligation may be contained in a collective bargaining agreement. 29 U.S.C. § 186(c)(5-8). Article VI § 2 of the Pension Agreement between Keystone and the Union recites in pertinent part: "The Company agrees to make contributions to the trust fund on an annual basis during the terms of the Agreement." When an annual funding obligation is contained in a collective bargaining agreement, ERISA provides:

> "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the

terms and conditions of such plan or such agreement."

29 U.S.C. § 1145. The Supreme Court has interpreted the statutory phrase "to the extent not inconsistent with law" as meaning that courts will not enforce collectively bargained payment obligations that would "lead to" situations condemned by law, or that would allow a party to "reap the fruits" of illegal collective-bargaining provisions, such as violations of the Labor Management Relations Act, the antitrust laws, or the National Labor Relations Act. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86-88 (1982). Neither the majority nor Keystone argues that the annual contribution obligation in the collective bargaining agreement violates the Labor Management Relations Act, the antitrust laws, or the National Labor Relations Act. With the exception of collectively bargained payment obligations that would lead to situations condemned by law or that would allow a party to reap the fruits of illegal collective bargaining provisions, an employer's failure to make a contribution agreed upon in a collective bargaining agreement violates ERISA. *Winterrowd v. David Freeman and Co.*, 724 F.2d 823 (9th Cir. 1984).

In December of 1980, without notifying the pension beneficiaries (hereinafter the "Union"), Keystone sought and obtained from the IRS a waiver of the ERISA minimum funding requirement. In its June 1981 summary annual report to the pension plan beneficiaries, Keystone revealed that the IRS had granted the waiver of the ERISA minimum funding requirement and that the employer had contributed nothing to the pension plan for the plan year from July 1, 1979 to June 30, 1980. The Union filed a grievance and after the grievance was submitted to an arbitrator, argued that Keystone's failure to make an annual contribution violated the Pension Agreement. The arbitrator agreed, holding: "The pension agreement was violated by the Company which is ordered to pay $2,147,932.00 to the pension fund with interest at 8% per annum from July 1, 1980, until paid."

The Union filed suit under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to enforce the arbitrator's award, contending that the award required immediate payment of the full amount. In its answer, Keystone construed the award as requiring payment in accordance with the IRS' grant of waiver of the ERISA minimum funding requirement—*i.e.*, 15 years of equal installments plus interest. The parties filed cross-motions for summary judgment; the union contended that the amount was due immediately; Keystone argued that there was no cause of action because it was "willing to pay $2,147,932.00 to the pension fund with interest at 8% per annum from July 1, 1980 until paid. . . ." The Union addressed this "case or controversy argument" in its "Memorandum of Law in Opposition to Defendant's Motion to Dismiss and/or for Summary Judgment." Keystone raised its public policy argument in its "Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment." The Union's reply brief to Keystone's Memorandum in Opposition to the summary judgment motion failed to raise its constitutional law issues (whether it was denied due process by not receiving notice and an opportunity to be heard before the IRS and whether the IRS impermissibly exercised Article III power in determining the contract rights of private parties).

The district court rejected Keystone's public policy argument, commenting that:

> "Sections 302 and 303 of ERISA merely provide that where an employer cannot meet the minimum funding requirements set by ERISA without substantial business hardship, the Secretary of the Treasury may waive the funding requirements for that year, and the employer must repay the amount waived in equal payments over 15 years. This waiver, however, merely permits an employer experiencing financial difficulties to avoid payments to the pension fund and remain in compliance with the ERISA statutes. It sets the *minimum* standard for payments. It does not bar employers from undertaking greater contractual

> obligations, nor does any language in the statute relieve the employer from obligations which it has voluntarily undertaken by entering into a collective bargaining agreement."

Addressing the question of whether the Secretary's grant of a waiver of the ERISA minimum funding requirement is a finding that requiring payment of the ERISA funding amount would be adverse to the beneficiaries' interest, the district judge noted:

> "The problem with that argument is that it makes the Secretary's finding on whether funding the plan would harm the employees determinative of whether the arbitrator's award is contrary to public policy. No written findings by the Secretary have been brought to this court showing the basis upon which the Secretary presumably concluded that funding the plan would be adverse to the interests of plan participants."

Because the district court judge found the arbitrator's decision unclear on the question of when the payment was to be made, he denied both parties' motions for summary judgment without prejudice and remanded the case to the arbitrator for clarification. The union was given leave to reinstate the case within 90 days if the arbitrator failed to rule or Keystone failed to comply with the arbitrator's order.

After the arbitrator issued a supplemental award ordering immediate payment, the Union moved the district court to reinstate its enforcement action and both parties renewed their motions for summary judgment. The Union raised its due process and Article III arguments in its Memorandum in Support of its Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment. The district court granted the Union's motion for summary judgment and denied Keystone's "[f]or the reasons set forth in [the] court's order of June 16, 1983 [remanding the case to the arbitrator]."

A. Waiver of the Constitutional Issues

The majority holds in footnote 1 that the Union waived its argument that the IRS' grant of waiver of the ERISA minimum funding requirement was unconstitutional. According to the majority, the constitutionality arguments were waived because the Union failed to raise its constitutionality arguments in its reply brief in the first summary judgment motion. I believe this holding to be in error for several reasons.

First, a review of Fed.R.Civ.P. 56 reveals that it fails to mention supporting briefs or reply briefs; thus, in requiring parties to raise legal arguments in their reply briefs, the majority imposes a requirement that does not appear in the literal language of Rule 56. Secondly, the majority apparently assumes that the moving party will always have the opportunity to file a reply brief. To the contrary, the moving party may not have the opportunity to file a reply brief because opposing affidavits may, at the discretion of the court, be filed and received at the summary judgment hearing. 10A Wright, Miller and Kane, Federal Practice and Procedure, § 2719 at 14. Thus, the moving party may be unaware of the full scope of the reply until the actual hearing of the motion. Finally, the majority overlooks both the fact that the district court denied the first motion for summary judgment without prejudice and the effect of a denial without prejudice on the parties' opportunity to raise additional issues. "A denial of a summary judgment motion is not a decision on the merits; it simply is a decision that there is a material factual issue to be tried." 10 Wright, Miller and Kane, Federal Practice and Procedure, § 1712 at 587. "The denial of summary judgment does not preclude either party from raising at trial any of the issues dealt with on the motion." *Id.* Because the district court denied the motion for summary judgment without prejudice, it does not follow that the Union was precluded from raising the issue of whether the IRS' grant of waiver of the ERISA minimum funding requirements was constitutional. Thus, the majority's holding that the Union's constitutional

arguments were waived is in error because the holding imposes a new procedural requirement (raising issues in a reply brief in a summary judgment motion) that is without support in the literal language of Rule 56 and overlooks the effect of the denial of a motion for summary judgment on the parties' opportunity to raise additional issues. Contrary to the majority's view, it was proper for the Union to raise its constitutional arguments in the second motion for summary judgment proceeding since the denial of the summary judgment motion without prejudice did not preclude the Union from raising the issue of the constitutionality of the IRS' procedure for waiving the ERISA minimum funding requirement.

B. The Constitutional Questions

An examination of the majority's reasons, which are supported neither by case law nor statutory authority, reveals that its holding rests not only on the fairness and accuracy of the IRS determination of whether to waive the ERISA minimum funding requirement but also on the constitutionality of the role it imposes on the IRS. The majority begins its analysis by correctly noting that "the well-defined and dominant public policy embodied in ERISA [is] to protect plan participants from the unnecessary termination of their pension plans." The majority reasons that because the IRS found that Keystone faced a "substantial business hardship," the arbitrator's "refus[al] to permit Keystone to rely on the payment schedule outlined in ERISA's waiver provision . . . jeopardized the continued existence of Keystone's pension plan, to the serious detriment of the plan participants." The majority concludes that because the arbitrator jeopardized the continued existence of the pension plan in refusing to allow Keystone to rely on the payment schedule outlined in the ERISA waiver provision, he violated public policy. There are several flaws in the majority's analysis. Initially, it is apparent that the majority's holding rests on the assumption that the IRS' determination was necessarily fair and accurate; on the other hand, if the IRS' determi-

nation to waive the ERISA minimum funding requirements was, in fact, inaccurate, the arbitrator did not violate public policy by requiring Keystone to make the annual contributions set forth in the Pension Agreement. Moreover, the majority's holding equates the contractual annual funding obligation under the pension agreement with the ERISA minimum funding requirement; in effect, if the IRS waives the ERISA minimum funding requirement, under the majority's holding, the contractual annual funding obligation under the pension agreement also is waived because an attempt to enforce the contractual obligation would be violative of public policy. Thus, under the majority's approach, the IRS' determination of the statutory requirements also determines the parties' rights under the contract (the pension agreement).

Before addressing the Union's constitutional arguments, I note that the statutory scheme for granting waivers of the ERISA minimum funding requirement does not appear to contemplate the waiver of separate contractual obligations to make annual contributions. The statute provides that the Secretary of the Treasury "may waive *the requirements of section 1082(a) of this title*" (emphasis added); the statute fails to specify that the Secretary may waive contractual funding requirements contained in pension agreements between private parties. Moreover, the application for the waiver is made by the employer and the statute fails to provide for giving notice or an opportunity to be heard to the beneficiaries. The statute requires the Secretary to consider whether:

> "(1) The employer is operating at an economic loss,
>
> (2) There is substantial unemployment or underemployment in the trade or business and in the industry concerned,
>
> (3) The sales and profits of the industry concerned are depressed or declining and,
>
> (4) It is reasonable to expect that the plan will be continued only if the waiver is granted."

29 U.S.C. § 1083(b). However, the statute does not provide beneficiaries an opportunity to present evidence on these issues and the Secretary is not required to provide a written record in support of his decision. Indeed, the district court found: "No written findings by the Secretary have been brought to this court showing the basis upon which the Secretary presumably concluded that funding the plan would be adverse to the interest of plan participants." On the basis of this statutory scheme, I cannot conclude that Congress intended that the IRS' determination of the employer's obligations under ERISA be determinative of the contractual rights of private parties since the statute is structured to waive only the statutorily created right to minimum pension funding.

The Union raises two constitutional objections to the contention that the IRS' decision to waive the ERISA minimum funding requirements nullifies their contractual right to an annual contribution under the pension agreement. First, the Union contends that waiver of their contractual right to an annual contribution from Keystone without notice or an opportunity to be heard violates the Due Process Clause. Because the statute does not require the IRS to conduct a formal trial-type hearing in determining whether to grant a waiver of the ERISA minimum funding requirement, the decision whether to grant the waiver is more properly classified as an "informal" agency action. Although the applicable statutes and regulations may permit an agency to act informally, the agency's informal decision-making procedure may not violate the constitutional rights of those who will be adversely affected because an administrative decision that deprives a person of "life, liberty, or property, without due process of law" violates the Fifth Amendment. *Mathews v. Eldridge*, 424 U.S. 319 (1976). In addressing a due process challenge to an informal agency decision based on the deprivation of a property interest, the court must determine:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures

> used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Mathews, 424 U.S. at 335.

Applying the *Mathews* analysis, it is clear that under the majority's holding, the IRS' decision to grant a waiver of the ERISA minimum funding requirement also relieves the employer of his contractual obligation to make an annual contribution under the pension agreement because in the face of the IRS decision to grant the ERISA waiver, an attempt to enforce the contract would be violative of public policy. Since the IRS' decision deprives the beneficiaries of their contractual right to an annual contribution, the decision, in effect, impairs a constitutionally protected property interest. Because, under the majority's analysis, the IRS decision to waive the ERISA minimum funding requirement also waives the contractual minimum funding requirement, the IRS procedure for granting an ERISA minimum funding requirement must be examined to determine the risk of an erroneous deprivation of the contractual right to minimum funding; the probable value of additional or substitute safeguards; and, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute safeguards would entail. *Mathews*, 424 U.S. at 335. In essence, the statute requires the Secretary of the Treasury to make two evidentiary determinations before granting a waiver of the ERISA minimum funding requirement: (1) the employer is facing a substantial business hardship and (2) that granting a waiver of the ERISA minimum funding requirement would be in the interest of the plan participants. *See*, 29 U.S.C. § 1083(b). If the IRS grants the waiver, the company must, in subsequent years, contribute, "the amount necessary to amortize each waived funding deficiency (within the meaning of section 1083(c) of this title) for each prior plan year in equal an-

nual installments (until fully amortized) over a period of 15 plan years." *Id.* at 1082(2)(C). In the instant case, the IRS' grant of a waiver of the ERISA minimum funding requirement stated:

> "The information submitted with the request and at an informal conference shows that the Company has suffered a substantial loss for the Company's fiscal year ended June 30, 1980, for a variety of reasons, most of which relate to serious downturns in the industries to which it sells its products, including the automotive industry, housing and agriculture. Further, the Company continues to experience a serious problem maintaining a sufficient amount of working capital to prevent technical default under its prime loan obligations.
>
> The Company has nevertheless managed to continue its modernization program so that it can be positioned to take best advantage of turnarounds in the industry it serves. The Company has also pared costs and has reduced future benefit accruals under one of the largest pension plans it maintains. For these reasons, we believe the Company can recover from its present hardship and have therefore granted these waivers."

An analysis of these reasons reveals that although some of the facts on which the IRS relied may not be subject to serious dispute (*i.e.*,—"the downturns in the industries to which it sells its products"), other factual findings could be the subject of vigorous debate (*i.e.*,—whether the company "has . . . managed to continue its modernization program so that it can be positioned to take best advantage of turnarounds in the industry it serves" and whether "the Company can recover from its present hardship."). Moreover, under the majority's analysis, the government's interest in making a fair and accurate determination of whether to grant a temporary waiver of the *ERISA* minimum funding requirement has been expanded to include an interest in making a fair and accurate determina-

tion of whether to grant a temporary waiver of the *contract's* minimum funding requirement. I cannot join the majority's holding that the beneficiaries' contract rights can be nullified by an IRS ERISA minimum funding waiver determination without granting the beneficiaries, who have a contractual right to an annual contribution from the company, the right to notice and an opportunity to be heard on the questions of whether the employer actually faces a substantial business hardship and whether a waiver of the minimum funding requirement in the Pension Agreement would be in the best interest of the pension beneficiaries.

As a second constitutional objection, the Union directs our attention to the following passage in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982):

> "A matter of public rights must at a minimum arise 'between the government and others'. . . . In contrast, the liability of one individual to another under the law as defined . . . is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. . . . Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power."

458 U.S. at 69-70 (emphasis in original). The plurality in the *Marathon* decision held that the principle of separation of powers embodied in Article III permits legislative courts (non-Article III courts) in three situations: (1) territorial courts; (2) courts-marshals; (3) legislative courts and agencies established to enforce "public rights." The plurality defined "public rights" as "matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.' " *Marathon*, 458 U.S. at 67-8. The Supreme Court stated that no case arising between two individuals could be

characterized as one of public rights. *Id.* at 68-72. Although the *Marathon* decision addressed the constitutionality of bankruptcy courts, courts have applied it to administrative agencies, *see, e.g., Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir. 1983), and commentators agree that the decision may be applied to administrative agencies if an agency adjudication attempts to resolve private rights. *See, e.g.*, Forward—The Supreme Court, 1981 Term, 96 Harv.L.Rev. 257-68 (1982); Redish, Legislative Courts, Administrative Agencies, and the *Northern Pipeline* Case Decision, 1983 Duke L.J. 197 (1983). An " 'adjudication' means agency process for the formulation of an order." 5 U.S.C. § 551(7). An " 'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule-making but including licensing." *Id.* at (6). Because the IRS' grant of a temporary waiver of the ERISA minimum funding requirement is "a final disposition of an agency matter other than rule making," it is an adjudication; the IRS acts in a judicial function when determining whether to grant a waiver of the ERISA minimum funding requirement. Under the majority's holding the IRS' decision to grant a temporary waiver of the ERISA minimum funding requirement nullifies the beneficiaries' contract right to an annual contribution because an attempt to enforce the contract right would be violative of public policy; in effect, under the majority's holding the IRS determines contract rights between private parties, *i.e.*, whether an attempt to enforce the contract right to an annual contribution would violate public policy. Thus, under the majority's analysis, the IRS impermissibly wields Article III power because it determines the contract rights in a dispute between private parties.

The majority's failure to acknowledge these constitutional problems may, in part, be caused by its failure to examine separately the two sources of Keystone's obligation to make an annual contribution to the pension plan, ERISA and the pension agreement. Because the majority

holds in footnote 3 that Keystone did not waive its right to seek an ERISA waiver from the IRS, it appears to hold that the contract incorporates ERISA and that the minimum funding requirement in the contract is the same as the ERISA minimum funding requirement. Although I do not quarrel with the holding that a pension contract incorporates ERISA regulations that Congress intended to be immune from contractual waiver,[1] I am unable to conclude from that fact that the annual funding obligation in the contract will always be the same as the ERISA minimum funding requirement. First, an examination of the funding section of the pension agreement in this litigation reveals that the company contribution was to be made in accordance with a funding schedule set out in the contract; the contract, which was modified and reaffirmed following the passage of ERISA, fails to mention ERISA in the funding section. Secondly, as the district court correctly noted, employers are free to contract to contribute more than the ERISA minimum funding requirement. Thus, the employer's obligations are separate and independent. But, by assuming that the contract requirement of an annual contribution is the same as the ERISA minimum funding requirement, the majority places the IRS in the position of determining the contract rights of private parties when it decides whether to grant a waiver of the ERISA minimum funding requirement. As a result, under the majority's approach (equating the

[1] In addition to my point that the minimum funding requirement contained in the contract does not invariably equal the ERISA minimum funding requirement because the parties are free to contract for a greater minimum funding than ERISA requires, I cannot join the reasoning contained in footnote 3 of the majority opinion. The majority apparently holds that Keystone did not waive its right to seek a waiver of the ERISA minimum funding requirement because the contract term, which was drafted before ERISA was enacted, failed to, "explicitly waive Keystone's right to obtain a variance from the annual contribution requirement. . . ." I fail to understand how parties can explicitly waive rights granted by a statute that has not been enacted at the time the contract was drafted, much less agreed to.

contractual minimum funding requirement with the ERISA minimum funding requirement), the IRS wields Article III power in determining the contract rights between private parties.

Indeed, the majority's failure to acknowledge the separate contractual minimum funding obligation causes them to fail to appreciate the due process implications of their decision. The majority reasoned that because the IRS found that Keystone faced a "substantial business hardship," the arbitrator's "refus[al] to permit Keystone to rely on the payment schedule outlined in ERISA's waiver provision . . . jeopardized the continued existence of Keystone's pension plan, to the serious detriment of the plan participants." The majority concludes that because the arbitrator jeopardized the continued existence of the pension plan in refusing to allow Keystone to rely on the payment schedule outlined in the ERISA waiver provision, he violated public policy. In effect, the majority expands the Supreme Court's definition of "to the extent not inconsistent with law," in 29 U.S.C. § 1145 to include a public policy defense based upon the IRS' decision to grant a waiver of the ERISA minimum funding requirement. However, if the IRS' determination that the ERISA minimum funding requirement should be waived for a definite period of time not to exceed fifteen years provides the employer with an unreviewable public policy defense against its contractual obligation, the beneficiaries' contract rights have been impaired without their having notice or an opportunity to be heard by the IRS. Thus, the role of sole and final arbiter of public policy that the majority thrusts on the IRS exposes the IRS' ERISA minimum funding waiver determinations to due process attack under *Mathews v. Eldridge*, 424 U.S. 319 (1976).

To avoid casting doubt on the constitutionality of the IRS ERISA minimum funding requirement waiver procedure, I regard the employer's two sources of obligations to make a contribution (ERISA and the pension agreement) as separate and distinct. While the IRS has the final authority to temporarily waive the ERISA obligation, its determination to waive this statutory obligation

has no effect on the employer's contractual obligation to make an annual contribution. Thus, I find that the relationship between the IRS' procedure for waiving the ERISA minimum funding requirement and the collective bargaining agreement is analogous to the relationship between the Equal Employment Opportunity Commission and collective bargaining agreements:

> "Absent a judicial determination, the commission [EEOC], not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent. Permitting such a result would undermine the federal labor policy that parties to a collective bargaining agreement must have reasonable assurance that their contract will be honored."

W.R. Grace & Co. v. Local Union 759, ___ U.S. ___, 103 S.Ct. 2177, 2186 (1983); *see also* 126 Cong. Rec., at 20180 (remarks of Sen. Williams) ("It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on an employer's contribution promises. [P]lan participants for whom the employer promises to make pension contributions to the plan in exchange for their labor are entitled to rely on their employer's promises."). In my view, the Supreme Court's well reasoned decision in *Grace* requires us to hold that neither the company nor the IRS could alter the collective bargaining agreement without the beneficiaries' consent.

Because the majority places the IRS ERISA minimum funding requirement waiver procedure in constitutional jeopardy, I dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW AND ITS LOCAL 449,

Plaintiff,

vs.

KEYSTONE CONSOLIDATED INDUSTRIES, INC.,

Defendant.

No. 82 C 20189

ORDER

Before the court are plaintiff's and defendant's cross motions for summary judgment. Jurisdiction is invoked under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185; jurisdiction to enforce arbitration awards. For the reasons set forth below, both motions are denied without prejudice and the case is remanded to the arbitrator for clarification of his order.

I.

This dispute arose when Keystone Consolidated Industries, Inc. ("Keystone") did not make its contribution to the International Union, United Automobile, Aerospace and Agricultural Implement Workers Union of America and Local 449 ("UAW") pension plan for the plan year 1979-80. For that year, Keystone obtained a waiver of its statutory funding requirement from the Internal Revenue Service pursuant

to Section 303 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1083, which provides:

> (a) If an employer. . .[is] unable to satisfy the minimum funding standard for a plan year without substantial business hardship and if application of the standard would be adverse to the interests of plan participants in the aggregate, the Secretary of the Treasury may waive the [minimum funding] requirements of section 1082(a) of this title for such year. . .. The Secretary of the Treasury shall not waive the minimum funding standard with respect to a plan for more than 5 of any 15 consecutive plan years.
>
> (b) For purposes of this part, the factors taken into account in determining substantial business hardship shall include (but shall not be limited to) whether - -
>
> (1) the employer is operating at an economic loss,
>
> (2) there is substantial unemployment or underemployment in the trade or business and in the industry concerned,
>
> (3) the sales and profits of the industry concerned are depressed or declining, and
>
> (4) it is reasonable to expect that the plan will be continued only if the waiver is granted.

Section 302 (b) (2) (C) of ERISA requires the amount waived to be repaid in equal annual installments over a period of 15 years.

The UAW brought this action to enforce an arbitrator's award which requires Keystone to pay $2,147,932 to the pension plan trust fund with interest at 8-1/2% per annum from July 1, 1980 until paid. The UAW has requested that Keystone pay this amount, and Keystone has agreed to do so. Keystone, however, points out that the arbitrator's order does not specify the time by which this payment must be made. Keystone contends that the arbitrator did not place a time limit on the payment to enable Keystone to repay the amount over a 15 year period as required by ERISA.

Keystone argues that this court has no authority to modify the arbitrator's award or to resolve ambiguities in it by setting a time limit by which the award must be paid. Keystone further argues that setting a date by which payment must be made before the 15 year period has elapsed would contravene public policy as expressed in Section 302 and 303 of ERISA. The UAW argues that it is not seeking a modification of the arbitrator's award, as nothing in the arbitrator's order indicates that Keystone was to have 15 years in which to repay the amount.

II.

Keystone's argument that it would contravene public policy as expressed in ERISA to require payment before the 15 year period has elapsed is not persuasive. The overriding public policy behind ERISA was to protect employees against loss or diminution of funds that they and their employers have invested in employee retirement plans. *See* 29 U.S.C. § 1001 (b) and (c). Sections 302 and 303 of ERISA merely provide that where an employer cannot meet the minimum funding requirements set by ERISA without substantial business hardship, the Secretary of the Treasury may waive the funding requirements for that year, and the employer must repay the amount waived in equal payments over 15 years. This waiver, however, merely permits an employer experiencing financial difficulties to avoid payments to the pension fund and remain in compliance with the ERISA statutes. It sets the *minimum* standards for payments. It does not bar employers from undertaking greater contractual obligations, nor does any language in the statute relieve the employer from obligations which it has voluntarily undertaken by entering into a collective bargaining agreement.

Sections 302 and 303 do not establish a clear public policy of protecting employers from being called upon to fulfill their contractual obligations to fund employee pension funds. They are merely a concession to the needs of employers in achieving the overriding purpose of ERISA. The class which the statute

was designed to protect is employees, not employers, and requiring an employer to fulfill its contractual obligations to fund the pensions of these employees is not contrary to the public policy expressed in ERISA.

There is, however, one troublesome point which neither party has specifically addressed. In addition to the requirement of substantial business hardship, Section 303 also requires that "application of the [minimum funding] standard would be *adverse to the interests of the plan participants in the aggregate...*" for the Secretary to waive the minimum funding requirements. Since the Secretary granted a waiver, he presumably had found that payment of the funding standard would be adverse to the employees' interest. Because ERISA is for the protection of employee interests, it is arguable that it would be contrary to public policy to enforce an arbitrator's award which, in the Secretary's eyes, is contrary to employee interests.

The problem with that argument is that it makes the Secretary's finding on whether funding the plan would harm the employees determinative of whether the arbitrator's award is contrary to public policy. No written findings by the Secretary have been brought to this court showing the basis upon which the Secretary presumably concluded that funding the plan would be adverse to the interest of plan participants. By bringing this action, the Union, which is elected by the employees to represent employee interests, has taken the position that funding the plan in accordance with the collective bargaining agreement is in their interest. Under these circumstances, this court is unable to conclude that enforcement of the collective bargaining agreement requirements for pension funding would violate public policy as established by § 302 and § 303 of ERISA.

III.

Keystone's other argument – that this court has no authority to modify the arbitrator's award or to resolve ambiguities in it by setting a time limit by which the award must

be paid – is also without merit. While it is true that this court has limited authority to set aside or modify an arbitrator's decision, the court has the power to, and indeed necessarily must, interpret the arbitrator's written opinion in order to enforce it. No opinion by any arbitrator or any court ever explicitly addresses every contingency. Interpretation is therefore unavoidable.

Here the arbitrator directed Keystone "to pay $2,147,932.00 to the pension fund with interest at 8-1/2% per annum from July 1, 1980, until paid." The UAW quite reasonably construes this silence on the date by which payment is to be made to mean that it is to be paid immediately. Another plausible interpretation of the silence would be to give Keystone a reasonable time to make the payment. The term "until paid," which Keystone holds up as proof that the arbitrator intended to give the company a lengthy term during which to make the payment, is more likely to have been used by the arbitrator solely to indicate that interest was to run all the way to the payment date. It is very doubtful that the term was meant as a license for Keystone to pay it when it chose to do so. Nor is there any language in the arbitrator's opinion stating that Keystone was to have 15 years to repay this sum.

This court would be well within its authority to interpret the arbitrator's award as requiring immediate payment. The silence as to the time of payment, however, does leave ambiguity as to the intent of the arbitrator about time for payment, and it is conceivable that he could have construed the collective bargaining agreement as permitting the payments to be made over 15 years. This court sees no point in guessing about the arbitrator's intent when the matter can be remanded to him for clarification. *Botica v. Floyd Street Erectors, Inc.*, 485 F.Supp. 334, 340 (N.D. Ill. 1980); *Local 719 v. National Biscuit Co.*, 378 F.2d 918, 926 (3rd Cir. 1967). The parties are given thirty (30) days from the date of this order to seek clarification from the arbitrator as to the time at which payment is to be made. The case is hereby remanded to the

arbitrator and dismissed from this court. The UAW is given leave to reinstate within ninety (90) days if the arbitrator has not ruled or Keystone has not complied with the arbitrator's order.

ENTER:

_____

Stanley J. Roszkowski, Judge
United States District Court

Dated: June 16, 1983

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Name of Presiding Judge, Honorable Stanley J. Roszkowski
Cause No. 82 C 20189 Date Feb. 27, 1984

Title of Cause International Union, . . .UAW and its Local 449 – vs. – Keystone Consolidated Industries, Inc.

Brief Statement of Motion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel_____
_____

Representing _____
_____

Names and Addresses of other counsel entitled to notice and names of parties they represent._____
_____

Reserve space below for notations by minute clerk

For the reasons set forth in this court's order of June 16, 1983, plaintiff's motion for summary judgment is granted and defendant's motion is denied.

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Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 86-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KEYSTONE CONSOLIDATED INDUSTRIES, INC.,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 449,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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10 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Under a bargained Pension Agreement, Keystone must make annual contributions to fund the Plan. The amount is actuarially determined, implementing funding language in the Agreement. An arbitrator orders the 1979-80 contribution of $2,147,932 paid, with interest. Keystone refuses, arguing that, having obtained an *ex parte* waiver of ERISA's § 303 minimum funding requirements from the IRS, 29 U.S.C. § 1083, it is excused from the contractual obligation.

1. Does an IRS waiver of *statutory* minimum funding requirements extinguish private *contractual* obligations to fund the pension plan, as contrary to public policy?

2. If so, since the IRS is an Article I agency operating *ex parte*, does this extinction of private contract rights satisfy: (i) Fifth Amendment due process, and (ii) the prohibition against the delegation of Article III powers to an Article I agency?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-406

KEYSTONE CONSOLIDATED INDUSTRIES, INC.,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 449,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION FOR UAW & ITS LOCAL 449

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local 449,[1] by counsel, respectfully pray that the Court *deny* the Petition for Writ of *Certiorari.*

OPINIONS BELOW

The opinions below are reported at: *UAW & Its Local 449 v. Keystone Con. Ind.*, 793 F. 2d 810 (7th Cir.

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[1] Hereafter, jointly "UAW" or "Union."

1986), *on rehearing withdrawing*, 782 F. 2d 1400 (7th Cir. 1986), and *aff'g* No. 82-C-20189 (N.D. Ill. Feb. 27, 1984), which enforced the arbitration award.[2] The original panel opinion was withdrawn on rehearing after the United States filed an *amicus* brief urging rehearing.[3]

COUNTERSTATEMENT OF THE CASE

ERISA imposes certain minimum funding requirements on all sponsors of private, defined benefit pension plans, § 302, 29 U.S.C. § 1082. These are statutory requirements, and, as such, apply to all such plans *whether or not* collectively bargained. ERISA's § 303, 29 U.S.C. § 1083, allows the IRS to grant waivers of this *statutory* minimum, on a year-by-year basis, within stated limits. Such waivers are handled on an *ex parte* basis by the IRS because (i) § 6103 of the Code, 26 U.S.C. § 6103, prohibits disclosure of tax return information, and (ii) involvement of the participants or their representative would be cumbersome. *See* Rev. Proc. 83-41, 1983-1 Cum. Bull. 775.[4]

In its labor Agreement, Keystone undertook to fund the pension plan in an annual amount greater, and at a

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[2] The unpublished arbitration award, dated October 8, 1982, is *reproduced* in the Appendix before the Circuit, Cir. App. 10-35. The District Court first entered an Order, filed June 16, 1983, remanding to the arbitrator for clarification on the date payment was due. This Order is *reproduced* at Pet. App. 43a-48a. The arbitrator issued a Supplemental Award, dated July 7, 1983, *reproduced* Cir. App. 36-38, requiring immediate payment. On return to the District Court, the award was enforced by the February 27, 1984, Order which simply provided: "For the reasons set forth in this court's order of June 16, 1983, plaintiff's motion for summary judgment is granted and defendant's motion is denied." Cir. App. 9.

[3] The brief was filed by the Tax Division of the Department of Justice, representing the views of the Internal Revenue Service (IRS), concurred in by the Pension Benefit Guaranty Corporation (PBGC).

[4] *See generally*, discussion in the *Amicus* Brief of the United States, before the Circuit, at 10-11.

rate faster than these statutory minimums.[5] Employers enter into such private contracts every day, just as they frequently agree to pay wages in excess of $3.35 an hour.

Keysone failed to make a pension contribution of some $2,147,932 which was due, under this contract, for the 1979-80 year. The UAW, as it must, took the matter before an arbitrator. The arbitrator held that the contract required the payment, with interest.

For the intervening four or five years,[6] Keystone has forestalled this contractual obligation, largely by arguing that, because the IRS granted a § 303 waiver[7] of the minimum statutory obligation, it is contrary to "public policy" to enforce this private contract. That is, the contract debt is void.

Initially, two members of the panel[8] were swayed by this assertion. Judge Coffey dissented with vigor. On reading the initial opinion, the IRS and the PBGC, the very agencies charged with administration of ERISA, were moved to urge the Circuit, in clear terms, to reject Keystone's argument:

> That award, however, was based on Keystone's obligation under its collective bargaining agreement with the Union to make specified, annual contributions to its employees' pension plan. In our view, there is no public policy barring such an agreement

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[5] The Petition intimates that Keystone never really refused to pay, and no one is really hurt. If so, one wonders why Keystone ever litigated this matter. Both PBGC, who would have to pay under Title IV of ERISA, 29 U.S.C. § 1341, *et seq.*, if the plan terminated, and the participants (through the Union) see an injury. We suggest that these views are more credible than the self-serving rationale of a defaulting debtor.

[6] October 8, 1982, when the original Award was issued, to date. The period is longer if you count from the due date of the payment, *i.e.*, Spring of 1981 on a 1979-80 plan year.

[7] 29 U.S.C. § 1082.

[8] Flaum, J., joined by Jameson, Sr. D.J. of Montana.

> to make annual contributions to a pension plan. [Brief of the United States as *Amicus*, at 7]
>
> * * * *
>
> We find nothing, however, in the language of the waiver provisions or its legislative history that indicates that Congress intended to authorize the IRS to relieve an employer from its contractual obligations to make specified contributions to its employee's pension plan. . . . . Enforcement of an employer's contractual obligation to make certain contributions to its pension violates no policy of ERISA, even where such enforcement may result in a termination of the plan and where the IRS has granted the employer a waiver of the tax penalties that would otherwise attach to the employer's failure to satisfy the minimum funding requirements. [*Id.* at 9]

The panel then voted to rehear, withdrew the original opinion, and unanimously joined Judge Coffey's new opinion, enforcing the arbitration award. 793 F. 2d 810 (7th Cir. 1986), Pet. App. 1a-15a.

ARGUMENT

The final opinion below is scarcely as exciting as Keystone imagines. To be sure, the original opinion (now withdrawn) *was* exciting, as the need for an *amicus* by the United States attests. But that misadventure is now past. We are left with a routine judgment, enforcing a garden-variety arbitration award. That enforcement is premised on perfectly ordinary principles:

> [W]e hold that ERISA does not forbid parties to collectively bargain for obligations greater than, and separate from, the ERISA minimum funding obligations. [793 F. 2d at 814, Pet. App. 8a]

The United States, the Circuit, the UAW, and the participants all agree that *no* public policy is endangered here:

> The Justice Department argues, and we agree, that enforcement of an employer's contractual funding obligations is not in violation of any policy provision of ERISA. On the basis of this statutory scheme, we reject Keystone's argument that the IRS's determination of the employer's obligations under ERISA should be determinative of the contractual rights of private parties since the statute is structured to temporarily waive only the statutorily created right to minimum pension funding. [793 F. 2d at 815, Pet. App. 10a]

It should be remembered that these expressions come from the IRS, the *same* agency which granted Keystone its vaunted § 303 waiver, and the PBGC, which will have the honor of paying for any plan termination. There is no suggestion that any other Circuit disagrees, quite the contrary.[9] In this setting, Keystone's isolation completes the story which its self-interest began.

It is a tribute to the integrity of Judges Flaum and Jameson that, seeing their error, they withdrew the opinion and joined Judge Coffey. Such intellectual honesty ought not be an occasion for comment, much less a ground for *certiorari*.

Even if Keystone's fears were well taken, this is *not* the case in which to address the impact of "public policy" considerations on arbitration awards. Here the vitiation of private rights is by an Article I agency—which itself disclaims any such intent—under *ex parte* conditions required by a separate statute.[10]

As the decision below concludes,[11] if Keystone is right, two fatal constitutional blows will fall on ERISA's mini-

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[9] 793 F. 2d at 813-814, Pet. App. 7a-8a, discussing the Third Circuit's decisions. The D.C. Circuit's recent *Am. Postal Workers v. U.S. Postal Service*, 789 F. 2d 1, 8-9 (D.C. Cir. 1986), uses even stronger language in rejecting a "public policy" attack on routine arbitration awards.

[10] 26 U.S.C. § 6103.

[11] 793 F. 2d at 816-18, Pet. App. 11a-15a.

mum funding scheme: (i) lack of Fifth Amendment Due process, under *Mathews v. Eldridge*, 424 F. 2d 319, 335 (1976); and (ii) an unconstitutional delegation of an Article III judicial power, adjudication of private contract rights, to an Article I Agency, contrary to *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 69-70 (1982).

This Court has long warned against inviting unnecessary constitutional adjudication. This teaching is particularly apt here. The Seventh Circuit's resolution avoids the need to address either constitutional issue. The United States, as guardian of the "public policy" at issue, does *not* want them addressed. Finally, as the Circuit's answers are correct, so no mischief is done by waiting for a more opportune case.

CONCLUSION

For these reasons, we urge the Court to *deny* the Petition.

Respectfully submitted,

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW and its LOCAL 449,
Respondents.

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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* Petitioner's Statement Required by Rule 28.1 appears at page i of the Petition.

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REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

Rather than minimizing the importance of the issues presented in the case or the absence of need for review by this Court, Respondent's Opposition vividly confirms several compelling reasons for immediate review of the Seventh Circuit's decision.

First, the central issue in this case is whether the Seventh Circuit is correct in effectively holding that employees and retirees whose pension rights and benefits are established by collectively bargained pension agreements, are denied as a matter of law under all circumstances the rights and protections afforded by Section 303 of the Employee Retirement Income Security Act,

29 U.S.C. §1083.[1] As Respondents correctly note, collectively bargained pension agreements arise "every day" (Un. Opp. 3). Thus, the Seventh Circuit's decision denying Section 303 rights to employees and retirees under these agreements has a sweeping impact; *i.e.*, potentially hundreds of thousands of persons will never be able to receive the special benefits that Congress envisioned all pension plan participants and beneficiaries receiving from Section 303. In effect, Section 303 has been rendered null and void with respect to any collectively bargained pension agreement that contains an annual funding provision. [2]

Second, the Seventh Circuit concluded that because the Petitioner and Respondents included an annual funding provision into their pension agreement, they necessarily waived the statutory funding schedule allowed by Section 303 – even though the contract language was

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[1] Respondents, like the Seventh Circuit, emphasize that Section 303 only provides for the waiver of the *statutory* minimum requirement under ERISA (Res. Opp. 2), and that this case involves the waiver of a *contractual* minimum requirement. The flaw in this analysis, among others, is that ERISA supersedes any privately negotiated rights. At a minimum, even though the IRS may not have had the power to waive the entire contractual obligation under the parties' labor contract, it had the power to waive the statutory minimum portion of the contractually required amount. The Seventh Circuit refused to go even this far in reconciling Section 303 with the collectively bargained pension contract. As discussed in the text, in so holding the Seventh Circuit has rendered Section 303 effectively null and void.

[2] The Union suggests – with no evidentiary support – that pension plan participants are "injured" as a result of the waiver (Res. Opp. 3 n. 5). This argument does not square with the record evidence. The amount waived by the IRS was many times less than the difference between the value of the Pension Plan's assets and the higher value of benefits guaranteed by the Pension Benefit Guaranty Corporation (R. 24, Ex. 6 at pp. 131-32). Thus, whether or not the waived contribution had been paid when initially due, the Pension Plan would

(Footnote continued on the following page)

included years before Section 303 was enacted and was never discussed after Section 303 became effective. This standard conflicts with the standard of this Court and several courts of appeals which require the waiver of statutory rights to be "clear and unmistakable." *See, e.g., Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Maykuth v. Adolph Coors Co.*, 690 F.2d 689, 694 (9th Cir. 1982) ("We will not infer waiver of important statutory and contractual rights without clearer statutory instruction."); *NLRB v. South Central Bell Telephone Co.*, 688 F.2d 345, 355 (5th Cir. 1982), *cert. denied*, 460 U.S. 1081 (1983) ("contractual waivers of such fundamental statutory rights must be 'clear and unmistakable' "); *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982) ("The language of a collective bargaining agreement will effectuate a waiver only if it is 'clear and unmistakable' in waiving the statutory right." (citations omitted)). Furthermore, the Seventh Circuit's decision conflicts with "national labor policy [which] disfavors waivers of statutory rights by unions and thus a union's intention to waive a right must be clear before a claim of waiver can succeed." *Chesapeake & Potomac Telephone Co.*, 687 F.2d at 636. The Seventh Circuit

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2 *(Continued)*

have been woefully underfunded. Because that underfunded condition would be expected to last for approximately 25-30 more years (*id.* at pp. 133-34), participants and beneficiaries of the Pension Plan would have no expectation of receiving more than the PBGC-guaranteed level of benefits in the event the Plan was terminated, regardless of whether the 1979-80 contribution had been timely paid or not. That level of benefits, however, would be guaranteed to the participants and beneficiaries regardless of the funding status of the Plan. Thus, the participants and beneficiaries were in no worse position with the waiver than they would have been if the waived contribution had been paid. In fact, they were in a better position with the waiver because the waiver improved Petitioner's prospects for continuing to fund the Pension Plan and thereby eliminate its underfunded status.

failed to apply the "clear and unmistakable" standard in ascertaining the intent of the parties when they included the "annual funding" language in the collective bargaining agreement, a substantial and dangerous departure from settled law. If the Seventh Circuit had applied the correct standard, it would have found that the language was adopted in 1968, long *before* the enactment of Section 303, and that the applicability or waiver of Section 303 was never discussed in subsequent collective bargaining. The Seventh Circuit's implied exception to the "clear and unmistakable" standard deserves review. *See AT&T Technologies, Inc. v. Communications Workers of America*, 106 S. Ct. 1415 (1986).[3]

Third, the Seventh Circuit, in rather cursory fashion, has found the entire Section 303 waiver granting procedure unconstitutional. In so doing, the court of appeals has gutted a vital element of a comprehensive regulatory scheme governing pension benefits in this country. A safeguard designed to protect thousands of beneficiaries has been eliminated with no justification in clear contravention of congressional intent. Indeed, the Seventh Circuit's decision jeopardizes the authority and operation of numerous administrative agencies.

Finally, the Seventh Circuit's decision conflicts with the Third Circuit's decision in *McMahon v. McDowell*, 794 F.2d 100 (3d Cir. 1986). In *McMahon*, the Third Circuit gave full effect to the Section 303 waiver at issue in that case. The conflict between this case and *McMahon*

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[3] Respondents cite the Department of Justice's argument that Section 303's legislative history supports the Seventh Circuit's decision. However, neither Respondents nor the Department cite any legislative history to support their position. As Petitioner already has shown (Pet. 12-13), the legislative history clearly establishes that Section 303 is intended to apply to all pension plans – specifically including those produced by collective bargaining. The Seventh Circuit's decision runs directly afoul of congressional intent.

leaves employees, unions and, most importantly, pension plan participants and beneficiaries, in a quandry as to the legal significance of a funding waiver obtained in conformity with the procedural and substantive requirements of Section 303.[4]

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[4] Respondents contend that this case involves a "routine judgment, enforcing a garden-variety arbitration award" (Res. Opp. 4). This may be true if one ignores the impact of ERISA, which the arbitrator and the courts below have done. The relationship between ERISA and collectively bargained pension agreements presents complex and vitally important issues that affect numerous employers and unions, as well as hundreds of thousands of individuals covered by collectively bargained pension agreements. This is hardly a "garden-variety" case.

The Union also cites *American Postal Workers v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986). That case has no bearing here because it had nothing to do with an arbitration award which irreconcilably conflicted with the requirements of federal law.

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition for Writ of Certiorari, the Court should grant the Petition and give this case plenary consideration.

Respectfully submitted,

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